Love, Marriage and Money . . .

An Analysis of Financial Relations Between the Spouses

Canadian Advisory Council
on the Status of Women

Conseil consultatif canadien
de la situation de la femme

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Louise Dulude

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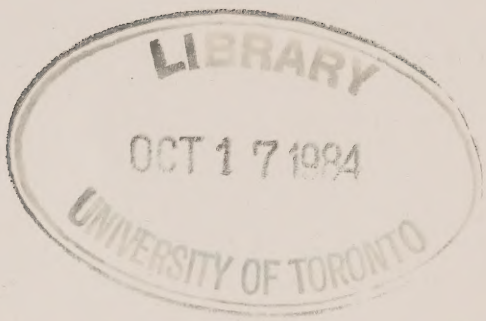

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Preface

This book is dedicated to Irene Murdoch, Helen Rathwell, Barbara Leatherdale and Jocelyne Delage, who endured the enormous financial and emotional costs of pursuing their claims for a fair share of their families' economic resources all the way to the Supreme Court of Canada. Thanks to these four courageous women, thousands if not millions of Canadians are now aware of the crucial importance of family law in the continuing struggle to achieve true equality between the sexes in our society.

I also wish to express my sincere gratitude to all those who helped in the preparation of this book. They include: the numerous people who had vigorous discussions with me on these issues in the last few years; the dozen or so good friends and experts who provided useful comments on earlier versions of the book; and last but not least, the staff of the Canadian Advisory Council on the Status of Women, who made helpful suggestions on the text, improved its style and gave the book its final form. To all of the above, thank you very much.

The Author

Louise Dulude is a lawyer-researcher specializing in the economic rights of women. Her previous reports for the Canadian Advisory Council on the Status of Women include ***Women and the Personal Income Tax System***, ***Women and Aging*** and ***Pension Reform With Women in Mind.***

Introduction

Who gains most from marriage? Is it men, or women, or both? When the Gallup organization asked adult Canadians that question in 1979, half the people of both sexes thought that men and women benefitted equally. Of those who disagreed, the majority of both women and men answered that marriage was more advantageous for the male sex.[1]

The good news in these answers is that they are vastly better than those given 25 years ago. At that time, only a quarter of people of both sexes believed that married women and men gained equally. Forty-one percent of the women and 29 percent of the men thought that the other sex benefitted most.[2]

The negative aspect of these findings is that after more than a decade of efforts to change our laws and institutions to place women on an equal footing with men, we still have a long way to go to reach that goal. This is strikingly confirmed by figures we will see in following chapters showing that while Canadian women now perform more than 55 percent of all the hours of work done in this country, their share of the total taxable income is only 29 percent.[3]

The main tools women have used to try to improve their economic position are demands for equal treatment in the paid labour market, continuing pressures to have governments adopt income redistribution and child care programs to reduce the burden of parents, and a strong push for reforms in family laws to guarantee married women an equitable share of the earnings and assets of their spouses.

As this publication is particularly concerned with the equality of women in marriage, it will touch briefly on all three of these major fronts but will mainly concentrate on the third, relating to family laws. It will ask why married women are not entitled to as much power as their husbands over the money that comes into their family through their joint efforts; why divorced women, whose numbers are growing at a phenomenal rate, are still denied a fair share of the assets they helped to earn and are treated by our legal system like superfluous creatures whose needs are much less important than those of their former spouses; and why widows, to whom our society owes an enormous debt, have even less right to their husbands' property than divorced women in many provinces and are denied independent pension protection for the work they did all their lives in the home.

In addition to describing the injustices of the present system, this report will see how each one of these barriers to women's equality can be overcome. In doing this, it will demonstrate that the perfectly egalitarian relationship is indeed possible and that it is up to us to exert the necessary pressures to make it a reality.

Marriage Yesterday, Today and Tomorrow

"Love and marriage, love and marriage
Go together like a
horse and carriage . . ."

When young couples are asked why they want to get married, their immediate response almost invariably is: "Why, it's because we love each other." If you press the point further, what you most often hear is: "We want to get married because we're in love and we want to live together and maybe, sometime in the future, we want to have children and raise them together."

The puzzling thing about those answers, when you stop to think about it, is that a woman and a man don't have to be married to do any of those things. As young lovers know full well, millions if not billions of people all over the world since the beginning of time have loved each other, lived together all their lives, and raised children together without the benefit of a wedding ceremony.

Having thus taken love out of marriage, so to speak, we find no other answers to why people want to marry — which is strange since marriage is probably the most popular of our institutions. Surveys invariably show overwhelming support for it. They also report that close to 90 percent of adolescent Canadians and Americans of both sexes expect to marry and raise a family.[1]

Still, the closest our family experts come to explaining such enthusiasm toward matrimony is to say that Canadians value marriage because of their "socialization experiences" and their perception of the "organization of (our) society."[2] In other words, the main reason young people marry is that marriage is "the right thing to do."

One of the most important elements contributing toward that feeling is the fact that parents, teachers, spiritual leaders and governments are continually saying to everyone in general, and to young girls in particular, that marriage is good. How many times must a child hear the words "and they were married and lived happily forever after" before she gets the message that this is the only road to happiness? After years of Barbie and Ken dolls, sentimental shows and Harlequin romances, a young girl's capacity to make a critical assessment of the institution of marriage has effectively been stamped out.

If you ask parents and religious leaders why they encourage young girls to place most of their future hopes in the marriage market, they will likely answer that all they are seeking is the girls' own good. Indeed, most parents truly believe that a woman's most direct route to fulfilment and security is through marriage with a good

man who will take care of her and her children and be a good provider to them for life. The best way to ensure the unfolding of this happy scenario, they think, is through the formal and binding institution of marriage, which will give legal clout to the spouses' promises of eternal fidelity and mutual support.

Testing Traditional Beliefs About Marriage

Are these traditional beliefs in the beneficial effects of marriage justified? To find out, we will go back in time to a period when people knew exactly why they were getting married, and then follow the evolution of marriage until modern times to discover the roles it has played and is still playing in our society.

According to British authors Young and Willmott,[3] who analyzed family relationships from a historical as well as a sociological perspective, marriage has gone through three distinct and radically different stages:

Phase I, which took place before the Industrial Revolution, was a time of full economic cooperation between all family members. While the husband was the uncontested master of the household according to the law, in reality his power was considerably tempered by the fact that his very survival depended on his wife's work (including making all their food and clothes from basic ingredients) and her capacity to produce children to help on the farm.

As a result, although the respective powers of the spouses were not "symmetrical," a balance of some kind nevertheless existed because they were so economically interdependent.

Phase II saw the destruction of this balance as men went to work outside the family and important changes took place in women's roles. In the first place, husbands now had access to relatively substantial amounts of cash which they could spend as they chose.

At the same time, the new industries started to provide many of the products women used to make in their homes. Clothes, canned foods, bread and soaps were now commonly sold. The mass move to towns and cities to be closer to jobs also dried up women's traditional sources of cash, such as the sale of surplus eggs and produce from their gardens.

The role of children was also completely transformed. Instead of the economic assets they used to be, they soon came to be seen as a strain on family resources. New laws accentuated this evolution by forcing children to attend school and prohibiting them from working until a certain age.

Because of the need for cash to live in towns and cities and the diminished importance of their roles as producers of domestic goods and children, women became much more vulnerable and totally dependent on their breadwinner husbands. Family desertion increased as some husbands calculated that single life (or, more frequently, life with a new childless woman) would be financially preferable to staying with a first wife and her brood of hungry children.

According to Young and Willmott, this was the lowest point in women's power within the family. American law professor Mary Ann Glendon agrees. She believes that the changes brought about by the Industrial Revolution spelled "the beginning of the end of marriage as a reliable support institution."[4]

In retrospect, it seems quite clear that since the Phase II period in Canada, which peaked sometime between World War I and the 1960's, women who have been entering into marriage in the hope of finding lifetime financial security have been doing so against increasingly disadvantageous odds.

Phase III. Young and Willmott's modern stage is the product of women's efforts to redress the family power balance in their favour. They have achieved this by fighting for equal rights, by acquiring control over their own fertility and by entering the labour market in ever-increasing numbers.

Young and Willmott predict that in the "symmetrical family," which is to be the eventual outcome of Phase III, both husbands and wives will juggle full-time outside careers with parental responsibilities and home-making chores. People will marry to fill emotional needs. If and when love ends, their union will be quickly dissolved through a "no-fault" divorce. However, Young and Willmott have little to say about the asymmetry which results from mothers almost always taking charge of the children after a divorce.

How close have Canadian families come to attaining Phase III? In 1983, according to labour force statistics, less than 40 percent of married women aged 20 to 64 held full-time paid jobs.[5] Another 13 percent had part-time employment, while the rest were either unemployed or worked full time in their homes. Among wives with children under the age of six, 54 percent were full-time homemakers in 1981.[6] While these figures represent a tremendous increase in the labour force participation of married women in the past ten years, they also demonstrate that many of them are still a long way from financial self-sufficiency.

Comparisons of men's and women's incomes also show

an important "gender gap" in their earnings. Among people who had been employed for 49 to 52 weeks during 1981 (though not necessarily on a full-time basis), men earned an average of $23,931 a year while women earned $14,430.[7] In other words, the average female employee made 60 cents for every $1.00 earned by a man. Therefore, even for those women who spend most of their time in the labour market, financial equality is still a future dream.

Matrimonial property laws and pensions are two other areas in which the unequal treatment of married women is glaringly obvious. First, the infamous Murdoch case[8] of 1974 (in which it was held that an Alberta ranch wife who worked alongside her husband for 25 years was entitled to ***none*** of the assets they had accumulated under his name during the marriage because she had acted like "any ranch wife") brought the plight of wives to national attention. It led to changes in all provinces that improve the situation but still fall very short of making wives equal partners in the marriage. We will see in subsequent chapters the steps that must still be taken to attain that goal.

In the area of pensions, the extensive reform discussions that have taken place in this country in the last few years repeatedly underlined the fact that women are the prime victims of our inadequate retirement income system.[9] By ignoring the work women do in the home, by using benefit formulas that perfectly mirror their low wages, and by failing to equalize the entitlements of the spouses, our pensions produce devastating results. In 1982, six out of every ten spouseless women aged 65 and over — widows for the most part — were living in poverty in Canada.[10]

The one area in which Canada has come close to Phase III is the ease with which marriages can now be dissolved. Of the more than 90,000 divorces granted in 1981, almost a third were obtained under the no-fault grounds of "marriage breakdown."[11] Whether or not our laws are changed to make it easier to end a marriage, it is predicted that 40 percent of today's young Canadians will see their marriages end in divorce.[12]

If and when that happens, the woman's chances of obtaining continuing support from her ex-spouse, even when their marriage was of long duration and she was a full-time homemaker, are quite small and getting slimmer every year. Recently, it has not been unusual for Canadian judges to tell 45-year-old housewives that they will only receive maintenance for two or three years during which time they must find themselves a job.[13] After all, the modern reasoning goes, her "ex" is probably going to start

a new family and it would be unfair to saddle him with the continuing burden of an "alimony drone"!

Younger divorced and separated women with dependent children are also very likely to find themselves in deep trouble. Considering the exceedingly low maintenance payments they are granted and the difficulties they must surmount to collect them, it is not surprising that close to half of these families are now subsisting on incomes lower than the poverty line.[14]

Conclusions On the Benefits of Marriage Today

To sum up our investigation, the purpose of which was to determine whether the traditional beliefs about marriage were justified, we can conclude:

First, although it is true that marriage once provided women with economic security (if they survived childbirth, epidemics, etc., long enough to enjoy it), that proposition is no longer valid. Today, a young woman who neglects her own education and job training because she thinks her future husband will support her for life is running a grave risk of ending up alone and in poverty. The National Council of Welfare estimated that although more than 90 percent of women marry, three-quarters of them will eventually be forced to look after their own needs and those of their families.[15]

Second, marriage does not in itself impair a woman's capacity to be self-sufficient. In addition to the barriers all women encounter in the labour market, such as discrimination, job ghettoization and a lower pay for work of equal value, there are two main reasons why married women are not as financially well-off as their husbands. One is housework, which very few husbands share equally with their wives. The other is motherhood, which requires at least some absence from the labour market and years of care that is neither shared equally between the spouses, nor properly compensated or alleviated by government services. These additional responsibilities make it extremely difficult for women to compete as equals in the labour market.

The many time-budget studies[16] which have analyzed the hours women and men spend on various paid and unpaid activities all point to the same conclusion: the average married woman who wants to pursue a career outside the home had better be blessed with a cast-iron constitution. Compared to men, whose total working hours including transportation and housework typically add up to 55 hours a week, the average workweek of an employed married woman

starts at 63 hours and increases by two to three additional hours for each young child in the home. Contrary to popular belief, most husbands and fathers are still unwilling to share domestic and child care tasks with their wives.[17]

This is especially unfair because the total working hours of men have steadily ***declined*** since the turn of the century. They start work at a later age, retire much earlier and have much shorter workdays and workweeks than they used to have on the farm. The overall result, according to University of British Columbia sociologist Martin Meissner, is that the new male "leisure society" is being carried on the backs of women.[18]

As of 1976, Meissner concludes, women accounted for 55 percent of all the hours of work performed in this country, "and the gap has been widening ever since."[19] For this work, taxation statistics reveal, Canadian women receive only 29 percent of the country's taxable income.[20]

Third, parents and young girls may become less enthusiastic about marriage and motherhood as they become better informed about the risks these institutions involve.

Indications of Changing Attitudes Toward Marriage

A modest trend in that direction may already have started. Since 1975, when the Opportunity for Choice studies of Statistics Canada and the C.D. Howe Research Institute[21] found that "women are about as likely to marry nowadays as in earlier times and. . . are likely to marry at an earlier age,"[22] the marriage rate has abruptly plunged downward while the age of brides and grooms marrying for the first time has been going up.[23]

Other signs of a lesser degree of commitment to motherhood and marriage include: fertility rates that continue to drop, meaning that women are having fewer children than ever before; and divorce rates that are going up by leaps and bounds, indicating that at least one of the spouses in an increasingly large proportion of couples is not experiencing marital bliss.[24]

Finding out which spouse was least happy with the broken marriage turns out to be a difficult task. The fact that the wife files for divorce in the majority of cases is not very significant. (For example, when a man deserts his family he is not the one who has to go to court to obtain a maintenance order.)

The few Canadian and American studies that tried to determine which people are most likely to divorce and

remarry and why have come to the following conclusions:

- Disproportionately, it is families with low incomes and poorly-educated spouses that run the greatest risk of having a marriage breakdown.[25]
- When less educated, poorer wives are asked why their marriages ended in divorce, they most often mention highly provocative acts on the part of their husbands, such as adultery, physical and psychological abuse, drinking and non-support. Divorced wives from middle-income families more often cite subtler emotional motives such as sex-role conflict, changed interests and values, lack of communication and self-centredness of the husband.[26]
- Remarriage figures show that divorced men with the highest incomes, and thus the greatest choice, are most likely to marry again, while the exact opposite occurs in the case of divorced women. Among women, it is the poorest, least-educated divorcees who have the highest remarriage rates of all. High-income professional women are least likely to take a second spouse.[27]

One way of interpreting these results is to say that the people who seem to be the least happy with the married state are low-income husbands and well-educated wives. The first would partly confirm the theory of American feminist author Barbara Ehrenreich, who argues that the present system of low and unenforced maintenance payments, combined with the Playboy mentality ("Why sign on for a life contract with one woman when there are so many Bunnies to sample?") provides men, and low-income men in particular, with a strong financial incentive to leave their families.[28] The fact that professional women have the lowest rate of remarriage is consistent with these women's financial independence, which allows them to be highly selective in choosing their partners.

Whatever the outcome of these investigations, the fact remains that the institution of marriage is experiencing serious difficulties and many women are very unhappy with the present situation. This is particularly true of the financial aspects of marriage, including the economic relations of the spouses during their life together, when they divorce, or when one of them dies.

In the chapters that follow, we will take a closer look at these problems, their causes and their consequences. We will also explore the changes that would improve the chances of marriage and motherhood being a good way to "live happily forever after" in Canada.

Finances During the Marriage

"I'll never forget it. I was doing interviews for the Census and I came to this mansion in the woods. The woman who lived there said she had no idea how much money her husband made, that she had to ask him for money every time she needed a pair of stockings. . ."

— Census worker, 1971

The purpose of this chapter is twofold. To start, it will describe the economic rights of the spouses while they are living together and see what can be done to give women more financial clout within the marriage relationship. In a second and briefer part, it will take a closer look at the economic factors that are known to increase the likelihood of divorce, such as poverty and unemployment, and analyze the specific proposals that have been put forward recently to shore up marriages before it is too late.

Sharing Between the Spouses

To obtain a true picture of the financial relations Canadians have with their spouses, one would have to hide in dozens of homes listening to the intimate conversations of couples for a number of weeks or months. As no researcher has yet undertaken this challenging (and dangerous) task, and as no extensive survey of the financial dealings of Canadian spouses has yet been done, we have no means of knowing the actual way in which couples share their money and make economic decisions.

Gossip doesn't help either because it covers all the options. Everyone has heard of — but never met — at least two mythical husbands: the one who turns over all his paychecks and belongings to his wife, telling her "You take care of everything, my dear"; and the other who makes a good salary but spends it all on drinks and gambling while his wife and children are forced to go without food and decent clothes.

The few American studies which looked at power relations within the family concluded that "marital power is a function of income to a large extent."[1] The higher a spouse's income and occupational status, the greater his or her weight in making important decisions. As women's earnings are almost invariably much lower than their husbands', the inevitable conclusion was that "The egalitarian family as a norm is a myth."[2]

In addition to each spouse's earnings, the other factor that affects their economic position is the legal rights a wife or husband can claim over the couple's belongings and the income which comes into the family. These rights fall under two main headings: rights of ownership and management; and rights to be supported by the other spouse.

Ownership and Management of Couples' Properties and Assets

The general rule relating to the ownership and management of the couples' earnings and assets during the marriage is that unless they have made other arrangements through a

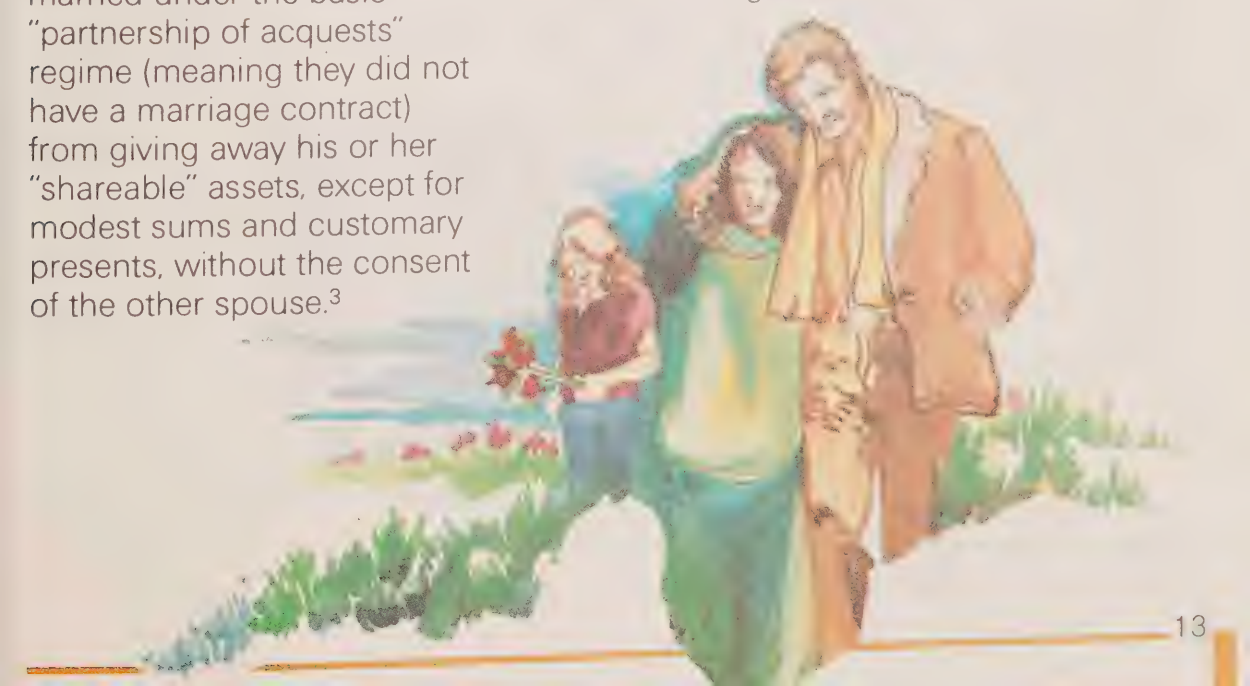
marriage contract, each spouse is entitled to do what she or he wants with the property she or he personally acquires. As a result, wives and husbands are almost completely free to save or squander their own earnings, investments, inheritances, etc., as they wish. Conversely, neither of them has any rights over the money and property acquired by the other spouse.

The exceptions to this general rule include two sorts of provisions: those intended to protect the spouses' future rights and those enacted to protect the matrimonial home.

The main purpose of measures designed to protect future rights is to prevent husbands or wives from disposing of their property in a way that would render meaningless the other spouse's right to a share of it upon divorce or death. One example is found in the Quebec Civil Code, which prevents a husband or wife married under the basic "partnership of acquests" regime (meaning they did not have a marriage contract) from giving away his or her "shareable" assets, except for modest sums and customary presents, without the consent of the other spouse.[3]

The closest counterpart in the other provinces is a universal clause allowing a spouse to apply to the courts to "restrain" the squandering of property or its transfer for less than its value in ways that would "defeat a claim of the other spouse."[4] But this step is rarely taken when the spouses are still living together.

The old common law presumption of advancement is another, quite different type of provision designed to protect future rights. Under this rule, property purchased by a husband and then put in his wife's name was presumed to have been transferred to her permanently as a gift so that she became its sole owner. This did not apply to similar transfers from ***wives to husbands,*** which were subject to the normal non-marital presumption of trust, under which a person to whom a property is transferred without payment is ***not*** presumed to own it unless he or she can provide clear proof that it was meant to be a gift.



Instead of keeping the presumption of advancement and making it non-sexist by extending it to husbands, as recommended by some law reform commissions,[5] all provinces except Manitoba and British Columbia (and the Northwest Territories) simply abolished it with retroactive effect.[6] The result, for example, is that everywhere in English Canada except in those jurisdictions, a man who deposits money in a retirement savings plan in his wife's name could turn around 20 or 30 years later and claim it all back. If she has no proof that he had meant to make her a gift of this money, he may be found to be its rightful owner. This is obviously unfair and could easily be remedied by reinstating the presumption of advancement and making it apply equally to both spouses.

The only softening of this harsh new rule of presumption of trust is the adoption, in these same jurisdictions, of provisions saying that money or property which is placed in the joint names of both spouses will be presumed to be co-owned by them until proof of the contrary.[7] The result, which is quite absurd, is that if a husband puts something half in his wife's name and half in his own, she will be able to claim her half share, but if he puts it all in her name she may lose it altogether.

As for measures intended to protect the matrimonial home, they vary a good deal but common elements stand out. In the prairie provinces, the home (which can include 320 acres of land in some cases) is protected through "homestead" legislation, which provides that any disposition of property made by the owner during the lifetime of the spouses must have the written consent of the other spouse, or a judge's order dispensing with it.[8] No previous registration of this right is required.

The four eastern provinces which had inherited the English institution of dower (Ontario, New Brunswick, Nova Scotia and Prince Edward Island) have now abolished it and replaced it with the legal institution of the "matrimonial home," which is defined as "property in which a person has an interest and that is or has been occupied by the person and his or her spouse as their family residence."[9] The protection of the non-owner spouse against the sale, gift or mortgage of the home without her or his consent is automatic and decreed by law.

As for Newfoundland, it chose the most direct route and made the spouses joint owners of all matrimonial homes.[10] This applies even if the home was acquired through "gift, settlement, inheritance or otherwise by one or both spouses prior to the marriage." Also included are the homes of people married before the law came into force as well as the homes that were acquired since the law was implemented. The only way to avoid co-ownership of the home in Newfoundland is through a specific renunciation in a marriage contract.

Quebec's provisions stand out most, partly because they also apply to rented premises and to household furniture, and partly because they require that the non-owner spouse take preventive steps to protect her/his right. With regard to the furniture, the Civil Code states that "Neither spouse may, without the consent of the other, pledge, alienate or remove from the principal family residence the household furniture used by the family . . . If a spouse has not consented . . . he may apply to have the act annulled."[11] In the case of tenants, consent of both spouses to sublet or end a lease becomes necessary after the owner has been warned that the rented accommodation is a "principal residence."[12]

To prevent the sale or mortgage of the couple's own home without her/his consent, a Quebec non-owner spouse must have previously filed a "declaration of residence" against the property at the registry office.[13] This resembles the law of British Columbia, under which a wife must register her right over the matrimonial home in order to prevent its sale or mortgage without her consent.[14] British Columbia husbands do not enjoy a similar protection.

In addition to these property rules, the only other family law measures distinguishing the financial relations of spouses who live together from those of strangers are the provisions relating to the support obligation.

Legal Right to Support

The Civil Code of Quebec provides that:[15]

- Spouses owe each other help and assistance. Both also owe their children support.
- Support is assessed by taking into account the needs and means of each. A spouse's contribution to the marriage can consist of work in the home.
- A spouse who buys on credit to meet the current needs of the family also commits the other spouse.
- If the spouses disagree as to the above rights and duties, either or both can go to court where a judge will settle their differences.

These four elements are the main components of our system of family support during the marriage. They are found in the laws of most of the other provinces.[16] The exceptions are Saskatchewan and Newfoundland. In those provinces, a wife's right to support during the marriage exists in the abstract but cannot be enforced while the spouses are still living together unless the one claiming support can prove that the other was guilty of adultery, cruelty or desertion.[17]

Two other exceptions of a very different kind are found in Manitoba's Family Maintenance Act. The first is a remarkable provision entitling spouses who need it to pocket money of their own. It reads as follows:

> Section 3 — ***Personal expenses*** — the right of a spouse to support and maintenance . . . includes the right, while living with the other spouse, to periodic reasonable amounts for clothing and other personal expenses and the right to sole discretion free of all interference from the other spouse in the use of those amounts.

The other unusual Manitoba provision is the following:

> Section 6 — ***Financial information*** — Spouses have the mutual obligation to provide each other upon request with information and accountings respecting the financial affairs of the marriage and the domestic establishment relating thereto and, without restricting the generality of the foregoing, with
> (a) copies of each other's income tax returns, together with assessment notices;
> (b) itemized statements of each other's gross and net earnings, showing all deductions; and
> (c) itemized statements of each other's debts and liabilities, if any.

Both these sections are enforceable through a court order, and non-compliance may be punished by a fine of up to $500 or a jail term of a maximum of 30 days or both. No other province has similar provisions.

Assessment of the Value of These Rights

How effective are these rights in giving wives equal financial power in their day-to-day dealings with their husbands? In the case of support provisions, not much at all, because Canadian wives who quarrel with their husbands over money never take them to court until their marriages have broken down.

If they did, it might not get them very far, as shown by a famous case concerning a couple from Nebraska by the name of McGuire.[18] After 34 years of marriage, Mrs. McGuire sued her husband for support, complaining that he had provided her with no money or clothing for three years. Although McGuire was a well-to-do man (he owned assets worth more than $100,000 at the time, which was 1953), he refused to pay for furniture and household necessities other than groceries. To top things off, their house had no running water or toilet and the furnace had been broken for five or six years.

After agreeing that such a state of affairs was deplorable, the court nevertheless decided

to take no action whatsoever for the following reasons:[19]

> The living standards of a family are a matter of concern to the household, and not for the courts . . . As long as the home is maintained and the parties are living as husband and wife it may be said that the husband is legally supporting his wife and the purpose of the marriage relation is being carried out.

Although Mr. McGuire's conduct was rather extreme, it was not very different in intent from that of several husbands whose actions were recalled by a group of older women at a meeting in Montreal in 1982.[20] These women remembered the tricks their housewife friends had used in the 1940's and 1950's to circumvent very stingy or domineering husbands. One favourite technique (impossible now, apparently) consisted of buying merchandise on credit from a department store and returning it for cash. Another trick required an accomplice: the downtrodden wife bought more groceries than she needed and sold some of them back to a friend.

Although we can laugh at such maneuvers today, it is not difficult to imagine how desperate these women must have been to resort to such devious stratagems. It also makes us wonder what tricks women who live in isolated areas or in job-poor provinces may be using now.

The one thing a woman in such a situation is unlikely to do is invoke our support laws to take her husband to court while continuing to live with him. As for pledging her husband's credit to buy necessities for the family, what tradesman would be foolish enough to extend credit to a penniless woman without her husband's signature?

Much more useful are the measures preventing a husband or wife from disposing of certain assets without the approval of the other spouse. Most effective by far are the automatic protections — against unilateral gifts of shareable assets in Quebec and against the unauthorized sale, mortgage or gift of the matrimonial home in all provinces except Quebec and British Columbia.

But even those automatic measures are far from perfect, as shockingly demonstrated in the recent Ontario case of ***Stoimenov*** v. ***Stoimenov***,[21] in which the husband mortgaged both the family home and cottage to the hilt without his wife's permission. He achieved this by swearing

false affidavits to the effect that he was not married (for the house) and that the cottage was not a matrimonial home. When Mrs. Stoimenov applied as prescribed in the law to have the mortgages set aside, she was rebuffed because, said the court, those who had accepted the mortgages had acted in good faith and could not have been expected to verify whether the affidavits were true.

Even Newfoundland's system of joint ownership of the home would be ineffective in such a situation, because the law of that province states that an affidavit from the spouse who sells or mortgages is "statutory evidence" that the property is not a matrimonial home.[22]

To sum up the economic rights of the spouses during the marriage, we can conclude the following:

- ☐ support laws have no effect whatsoever because they are never used
- ☐ "negative" property rights, such as those which prevent the sale or disposal of the matrimonial home without both spouses' consent, have proven to be unreliable
- ☐ even co-ownership, such as exists in Newfoundland for the matrimonial home, does not make much difference in the absence of an effective system of registration of the rights of the non-acquiring spouse

Proposals to Correct the Situation

Predictably, all but one of the main proposals which have been made to bring about greater equality within the marriage involve some degree of co-ownership and co-management by the spouses. These proposals follow four broad models.

Model I — ***Partnership by Marriage Contract.*** In both Canada and the United States, the family law reform process of the last decade has produced a great deal of interest in, and enthusiasm for, "relationship" contracts. Whether you plan to marry or cohabit with a lover, their supporters say, the ideal way to have the support and property measures that best suit your needs is to draft your own terms.[23] Instead of wasting time trying to change the family laws of ten provinces and two territories (or fifty states), some of them go so far as to say, just inform women of their rights and tell them to insist on a fair marriage or cohabitation agreement.

The problem with this approach is that it does not suit everybody. If you are a self-assured woman who knows the law well and can reasonably predict the course your life will take, then a marriage contract may be a very good thing for you. However, if you are a typical starry-eyed 20-year-old fiancée who knows nothing of the law but is convinced that

"everything will be fine because we love each other," a marriage contract could be the surest way to trouble.

Experts such as American law professor Mary Ann Glendon warn that:[24]

> There is no reason to think that increased use of marriage contracts would enable the economically weaker spouse to bargain for property division and future economic security in case the marriage terminates in divorce. On the contrary, European and American experience, and common sense, indicate that such contracts, if they did come into wider use here, would probably more often be used by the stronger party to contract out of or to restrict property division and future maintenance to the limits permitted by law.

For historical reasons too long to explain here, this is exactly what has happened in the province of Quebec. Of all couples who marry there now, about half have a marriage contract and most of those contracts provide for a regime of separation of property. As a result of this and of a long tradition of favouring contracts, although Quebec has one of the best property-sharing regimes in the country, less than half the women of that province are deriving any benefit from it.[25]

Model 2 — ***Deferred Sharing With Co-Ownership of the Home.*** In broad outline, this resembles the system presently in force in Newfoundland. The couple would own the matrimonial home jointly during the marriage (though exceptions could be made for those acquired through gift or inheritance or before they married), but no other sharing would occur until the end of the marriage through divorce or the death of one of the spouses.

On divorce or death, each spouse or her/his heirs would be entitled to half of all or most of the assets required by the couple during their life together, subject or not to the discretion of the courts to vary these shares in extraordinary circumstances. (These issues will be discussed in greater detail in the next chapters dealing with property division on divorce and death.)

This was the model favoured by the Ontario, New Brunswick, Manitoba and Saskatchewan Law Reform Commissions.[26] It was also endorsed by the Ontario Status of Women Council in 1983.[27]

The problem with these proposals, as seen above in relation to the ***Stoimenov*** case, is that joint ownership without proper registration of the non-acquiring spouses' rights makes very little difference. Voluntary registration, as advocated by the Ontario Status of Women Council, has already been dismissed as ineffectual in Quebec and British Columbia.

The best, and maybe the only possible solution would be the establishment of a central registry of marriages and marital agreements with computer access from all land registry offices. This is not so

outlandish since we already have a federal registry of divorces and a Quebec registry of matrimonial agreements. Once such a registry had been set up in a province, it would be up to those wanting to buy a property or accept a mortgage to verify whether or not the person dealing with them had a spouse. If they failed to do this adequately, the transaction would be annulled.

Model 3 — ***Deferred Sharing With Co-Ownership of the "Family Assets."*** This was the system contained in Manitoba's ill-fated Marital Property Act of 1977, which was adopted but never came into force because it was repealed following a change of government. In addition to the joint ownership of the matrimonial home, it provided for the co-ownership by the spouses — during the marriage — of all their non-commercial assets, including the contents of the home, the family cottage and car and those bank accounts which are used for family purposes. Assets such as businesses, farms and investments under the name of only one of the spouses would ***not*** have been shared until the end of the marriage.

The Manitoba law was strongly supported by the women's groups of that province. For one thing, they felt that joint ownership of the home alone would do nothing for the sizeable proportion of couples who live in rented accommodation. Also, it was generally agreed that the furniture, cottage, car and joint bank accounts were so intimately woven in the texture of a family's life that it seemed obvious that both spouses should have an equal say over their fate at all times.

Model 4 — ***Full and Immediate Community of Property.*** After a thorough study of the alternatives, the Royal Commission on Family and Children's Law of British Columbia concluded that only a system of full co-ownership, with joint management of all the assets and income of the spouses during the marriage, could make wives truly equal within the marital partnership. According to the Commission:[28]

> The real question is whether it is desirable to have a legal system of matrimonial property which imposes serious restrictions on the economic role of the wife . . . or whether (it) should be one which allows both spouses to participate in and benefit from their marriage equally.

Most Canadians agree. At its 1977 annual meeting, the National Action Committee on the Status of Women, which represents more than 260 women's organizations, adopted a resolution calling for "a system of community property with joint management by both spouses during the marriage."[29]

The Royal Commission of British Columbia rejected criticisms that such a system would be "too complicated," explaining that under it:

- each spouse could act alone in all ordinary transactions involving community property, the assent of both spouses being required only for important acts such as large gifts and the sale, mortgage or purchase of houses, land or the household's possessions
- money and property acquired before the marriage or obtained by way of gift or inheritance would not be part of the community property but would remain the exclusive and separate property of the acquiring spouse
- if one of the spouses ran a business or farm in which the other was not actively participating, the active one would make all the everyday decisions concerning it alone, needing the other's consent only for important moves such as the sale of the business or the mortgaging of the farm

The trend toward full sharing is even stronger in the United States. Seven states (Arizona, California, Idaho, Nevada, New Mexico, Washington and Louisiana) already have a system of full community with joint management, and others such as Wisconsin are seriously considering a change in that direction.[30] Several feminist American lawyers have written articles concluding that "nothing less than a present community (of property) can fully protect the interests of the lesser earner in a family's finances."[31]

California law professor Carol Bruch points out that[32]

> Unless a present shared interest exists in both spouses' earnings, wives (especially full-time homemakers) may be severely restricted during marriage in their access to credit. Even more dramatic are consequences for unpropertied women in common law or deferred community states who disagree with their husbands about family finances or predecease their spouses. These wives have no assets subject to their control during marriage or subject to testate or intestate disposition upon their deaths, a poor contrast to the position of married women in community property states, who are ordinarily entitled to equal control of the community during marriage and to disposition of one-half of the family's marital assets at death.

Some opposition to legislating greater sharing during the marriage has come from a small but influential group of feminist lawyers who believe that the economic equality of the spouses is a short-term problem that will be solved as women gain greater access to paid jobs:[33]

> In this conception, true economic and social equality of the sexes will ultimately emerge. At that point, sharing principles will become unnecessary and, in fact, will be destructive of individual rights to no important purpose. Once sex-based discrimination is a thing of the past, each spouse will in reality have property and the power that comes with it. Each can then own and manage his or her property as he or she deems best.

There are two problems with this view. First, it will be a long time until women gain full economic equality and earn as much as their husbands. Second, the lives of most spouses are so intertwined that they often make joint decisions that are potentially harmful to them as individuals. For example,

American law professor Susan Westerberg Prager writes:[34]

By and large, it is not practical for each spouse in a two-earner marriage to make employment decisions on a completely individualized basis, for each decision affects both spouses in direct ways . . . In a marriage of two professionals, each may decide to forego his or her first choice of employment because its location does not afford sufficiently desirable options to the other . . .

In some marriages one spouse's career will be subordinated temporarily, perhaps because of the need for education or the presence of children. Educations may be obtained in a serial fashion in order to maximize economic potential, with each spouse supporting the other while he or she is in school . . . Some couples believe that at least one of them should spend considerable time with children, particularly when they are young . . .

Other couples may conclude that it is desirable to structure their choices to give permanent priority to the advancement of one of them rather than equalize opportunities. Typical reasons for this choice might include one earner being less marketable than the other, one spouse having a stronger need for recognition outside the family, . . . or one spouse pursuing a career (e.g. military or foreign service) that makes it difficult for decisions about the other's career to be given equal consideration . . . .

In all these cases, which are just as easily conceivable in a perfectly egalitarian world as they are today, seemingly rational decisions made jointly by the couples involved could well result in one spouse having much lower earnings than the other. Would it be fair to deny the poorer spouse in these examples a share in the richer spouse's income? The answer is no.

After weighing the arguments for and against full sharing between the spouses during the marriage, it seems clear that such a matrimonial regime would be the best one for most of the women of Canada. Those who did not care for such financial intimacy would be free to avoid it by making other arrangements in a marriage contract.

State Programs to Help Impoverished Couples

As mentioned earlier, it is well known that people from disadvantaged groups are much more likely than others to experience family desertion and divorce. According to Canadian sociologist Anne-Marie Ambert, there are many reasons for this:[35]

An impoverished couple has many more problems to cope with than a more privileged one. The issue of money, or lack of it, takes center stage. Tensions arise because of inadequate, overcrowded, noisy housing; because of lack of food; because of a lack of diversions; and because of a constant worry about the future. Tensions also arise because of unemployment or the fear of it, and sometimes from the necessity of being on welfare . . . Separation and desertion follow. Divorce then takes place if and when money is available.

Further studies have found that while the link between marital breakup and poverty is real, it might not be due so much to poverty itself as to the instability of income caused by periodic unemployment.[36] In other words, if you marry a poor unemployable man whose status doesn't change, you will have an easier time of it than if you marry an employed man who then loses his job and his income.

Short of drastic economic measures far beyond the scope of this publication, can

anything be done to prevent many of these couples from experiencing the tremendous financial stresses that can make family life intolerable? Social policy analyst Leonard Shifrin thinks so.

Commenting on Statistics Canada's report that the poverty rate had greatly increased in 1982, he blamed this rise on the fact that our unemployment insurance system is designed for singles. "Sixty percent of former earnings, up to a maximum of $231 a week, is enough to keep a single person safely above the poverty line," he wrote, "But not a family." And that is why "Among singles, the poverty rate actually went down by half a percent. Among families it jumped 4 percent."[37]

To correct the situation, Shifrin advocates the setting up in every province of family income supplement programs such as those which already exist in Saskatchewan and Manitoba. Saskatchewan's Family Income Plan (FIP) is the more effective, giving benefits as high as $91 per month per child to low-income families. This keeps many of them out of poverty and has perhaps convinced several unemployed men that their families are not such a burden that they should desert them and start a new life elsewhere. Manitoba's program (called CRISP, or Child-Related Income Support Program) is more modest, with maximum benefits of $30 per child per month.

A major impediment to the establishment of similar programs throughout the country is the federal government's insistence that such supplements will not qualify for federal cost-sharing under the Canada Assistance Plan (CAP) unless their administrators subject all applicants to detailed enquiries about their assets. This is because CAP was designed to pay half the cost of provincial "needs-tested" programs such as social assistance, which base eligibility on a test of assets as well as income.

The proposal put forward to circumvent the problem is that CAP be made more flexible by allowing an evaluation of applicants' assets through sampling rather than individual inquiries.[38] This would give an accurate estimate of the proportion of payments qualifying for cost-sharing without the need to

set up expensive bureaucracies that inhibit eligible people from applying for fear of embarrassing invasions of their privacy. Considering the importance of such income supplements to family stability, it is unfortunate that the federal government persists in its refusal to make this small change in the CAP legislation.

Another quite painless way of improving the financial position of low-income families would be to reorganize the present system of federal benefits to families with dependent children. As eloquently pointed out by the National Council of Welfare, the sum total of the three federal child benefit programs — family allowances, tax exemptions for children, and the refundable child tax credit — is a roller coaster that makes little sense.[39]

This comes from the fact that each of these programs interacts differently with a family's income. Family allowances, because they are taxed, give greater benefits to the poorest families. Refundable child tax credit benefits stay the same until the family's income reaches $26,000, and then taper off and disappear at high income levels. The tax exemptions for children, like all exemptions and deductions, provide benefits that increase with a person's income and give nothing at all to families so poor that they are below the taxpaying threshold.

As a result, the benefits are distributed in a very erratic fashion. Here are the totals received by families with two children at various income levels in 1982:[40]

Table 1

Family Income	Total Benefit
Under $8,500	$1,168
$12,000	1,353
$24,000	1,428
$38,000	930
$40,000	977
$40,000 to $50,000	954

These are obviously strange results. In a rational system, benefits would be largest for poor families and would be gradually reduced as the families' incomes went up. This could easily be achieved by abolishing the tax exemptions for children and using the resulting savings to increase the refundable child tax credit paid to low and modest-income parents.

Money After Love Has Gone

"Divorce is a financial catastrophe for most women . . . It is difficult to imagine how they survive the severe economic deprivation; every single expenditure that one takes for granted — clothing, food, housing, heat — must be cut to one-half to one-third of what one is accustomed to."

— Lenore Weitzman, 1981

The trend today is to be upbeat about divorce. When Statistics Canada issued a report recently showing that the likelihood of any young Canadian divorcing someday had reached the rate of almost 40 percent, its study stressed over and over how "(T)he wish to divorce is really a reaffirmation of the ideal of marriage. In divorcing, one is freed to continue to search for the ideal marriage . . . (D)ivorce is clearly not a repudiation of marriage in principle but, rather, a reassertion of its value."[2]

One cannot help but being reminded of humorist Peter de Vries' quip, "I don't for the life of me understand why people keep insisting marriage is doomed. All five of mine worked out."[3] The difference is that unlike the Statistics Canada authors, de Vries knew it was a joke.

In February, 1983, Maclean's magazine did an extensive front-page feature article on divorce.[4] It contained nothing about all those boring single-parent mothers with incomes below the poverty line. Instead, it said that "Many counsellors and lawyers — and even clergymen — believe that divorce, traditionally considered a sign of social disintegration, may, in fact, signal a healthy adaptability, with the emergence of new types of families and new social groupings that may be more attuned to people's real needs."

A divorcee whose 13-year-old marriage had recently dissolved was quoted in the article as saying, "My life has steadily improved, and right now I would say it's pretty well perfect." By now, she may even agree with the family counsellor quoted who believes that "People are not seeing marriage any longer as a lifelong commitment. Overall, I think that may be a sign of health rather than sickness in a society."

The strange thing about all the above is that if divorce is really a healthy, normal and possibly even happy event, why is it that it is the poorest, least-educated and least well-adapted people who tend to do it most? Are the ten percent of divorcing women and men who are over 50 years old[5] also expected to become swingers with "bachelor pads"? One also wonders about the "greater freedom and diversity" experienced by the more than 40 percent of divorcing wives who find themselves alone

with young children to bring up.[6] (Note: 48 percent of divorcing couples have dependent children and the wife gets custody in 85 percent of the cases. Contrary to recent media hype, the proportion of fathers getting custody has barely changed in the past ten years.)[7]

But experts tell us not to worry about these women, because statistics show that three-quarters of divorced women and 83 percent of divorced men remarry within a few years after divorce.[8] In this case as well, however, a closer look at the figures reveals a quite different story.

Studies analyzing the likelihood of ex-wives remarrying find that it is greatly affected by a few crucial factors, such as the women's ages and the number of children at the time of the divorce.[9] As shown in Table 2, these interact in a complex fashion. Advancing years have a drastic effect, reducing a childless woman's likelihood of remarriage from 96 percent if she divorces before the age of 25, to 21 percent if she divorces after the age of 45. With a single exception (for women with three or more children divorcing at ages 35-44), a similar pattern holds true for all divorced women.

Table 2

Probability of a Divorced Woman Remarrying, By Her Age and Number of Children at Divorce[10]

	Number of Children		
Age at divorce	**None**	**1 or 2 children**	**3 or more children**
Less than 25	96%	93%	90%
25 to 34	81%	82%	81%
35 to 44	45%	61%	83%
45 and over	21%	23%	31%

The presence of children has a smaller effect than expected considering the widely-held belief that women with dependent children have a harder time finding husbands than their childless counterparts. The answer to this puzzle probably is that in addition to age, two other conflicting elements are involved. The first is the "self-sufficiency factor," which is a woman's capacity to earn a good salary and be financially independent. This would certainly be highest among childless women and would reduce with the number of children. The stronger this factor, the less pressure a woman would feel to remarry.

The other side of the coin is the "security factor," which is the degree to which marriage would raise a woman's standard of living. This is undoubtedly greatest for women with children, because they are the most likely to find themselves in poverty. The

more powerful the security factor, the greater a woman's desire to remarry. Table 2 shows that the security factor results in very high remarriage rates (as high as 83 percent) among women aged 25 to 45 who have three or more children. Past 45 years old, however, the age effect, which makes a woman less desirable on the marriage market as she gets older, seems to become much stronger and cancel the security factor almost entirely.

Overall these figures suggest that remarriage, especially among older ex-wives, cannot be taken for granted. Also, many women who remarry, particularly low-income ones with dependent children, may be doing it less by choice than because of absolute economic necessity. In the circumstances, it is not surprising that the rate of divorce for second marriages is even higher than for the first.[11]

We would therefore be very foolish to base our social policies on the assumption that divorced spouses all remarry happily and life resumes as before. On the contrary, our census figures show that single-parent families are the fastest growing in our society, from 477,525 in 1971 to 714,005 in 1981.[12]

This represents an increase of 50 percent in ten years, compared to an increase of 14 percent in the proportion of two-spouse families with children during the same period. Among single-parent families, 85 percent are headed by a woman and of these, 43 percent were living in poverty in 1981.[13] A 1980 Alberta study of divorced couples found that 20 percent of the ex-wives were on social assistance.[14]

Who is hardest hit by this poverty? According to most accounts, it is the children. After dozens of studies tried (unsuccessfully) to link the problems of children from broken homes to the absence of their fathers or the inadequacy of their mothers, it was finally established that the bulk of their difficulties resulted from the family's abrupt change of lifestyle and very reduced financial circumstances.[15]

In particular, it was found that children suffered a great deal from losing their homes and friends, which was inevitable in most cases because the house had to be sold and the family had to move to a poorer neighbourhood. Still other problems were created when the mother who had previously been at home on a full or part-time basis was suddenly forced to take a full-time job to feed the family. This abrupt reduction in the mother's availability, added to the exhaustion resulting from her often gruelling schedule, led some children to remark that they had lost not only their father, but their mother as well.[16]

Most damaging was the anger and resentment some children felt when comparing their own dingy and shrunken existence to the much more comfortable life their fathers and their second or third families enjoyed. How could such important differences in lifestyles exist between a man's present and previous families? Why are so many divorced women poor? What, if anything, can be done to improve the situation? These are the questions we will be addressing in the rest of this chapter.

To gain a better understanding of the sequence of events that generally surround a marriage breakdown, we will present a typical example and describe the various stages a woman goes through. Our example will be Mary Ann S., a quite ordinary, nice Ontario woman to whom we will give no end of trouble.

Mary Ann S. is from a respectable working-class background. Her father is a bus driver and her mother a housewife. When Mary Ann accidentally got pregnant at the age of 18 in her last year of high school, she and her boyfriend Jim decided to get married. Five years later, Jim told Mary Ann, who had been keeping house for him and their two young children in a home in the suburbs, that he intended to leave her to go and live with another woman. As their marriage had not been a happy one for some time, she decided to give up on the relationship and seek the advice of a lawyer.

Stage 1 — Legal Aid

Because Mary Ann was a housewife, she did not have much money of her own. How was she going to pay the hundreds of dollars that legal fees were likely to cost? She had read in the newspaper that uncontested divorces cost between $600 and $1,000[17] and contested ones a lot more than that, but she was not even sure what "contested" meant. What she did know was that Jim wouldn't be very receptive if she asked him for money to see a lawyer about their divorce.

A friend in whom she confided told Mary Ann about legal aid. It is a provincial

government program that provides free legal services to those who can't afford them. Although it is normally the total family income that determines whether a person is eligible, an exception is made for obvious reasons in cases of wives who are suing their husbands (or vice versa). If the wife's legal action results in her obtaining a share of the couple's assets, she is generally expected to pay back a part or all of her legal costs.

When Mary Ann went to the legal aid office, she was not badly treated but the experience was nevertheless somewhat unpleasant. Why should she have to wait in line, fill out innumerable forms and answer indiscreet questions when all her husband had to do was pick up the phone and hire himself a lawyer? She became acutely aware of her own lack of money and got her first taste of what it might feel like to be on social assistance.

Apart from legal aid, the only way to beat legal costs in a family breakdown case is for a person to act as her or his own representative in court. However, this is definitely ***not recommended*** unless the person in question has an unusual amount of self-confidence, has learned the necessary points of law well, and is dealing with a very simple and straightforward uncontested action (where the spouses agree on everything).

Stage 2 — Making Legal Decisions

Mary Ann then met her lawyer and clearly told her (her lawyer was a woman) that she had decided to permanently sever her relationship with her husband. Having ascertained that reconciliation was impossible, the lawyer advised her to sue for divorce under the federal Divorce Act on the grounds of adultery. If all went well, she said, the whole action could be over within six months.[18]

When Mary Ann asked what the other choices were, her lawyer explained that she could also sue for support and property division under Ontario law.[19] The disadvantage of following that course was that if Mary Ann wanted a divorce later, she would have to start a completely different action.

Asked why anyone would choose such an alternative over a divorce, the lawyer said that some people (for religious reasons, for example) do not want a divorce. Also, some people who want a divorce can't ask for one because they haven't got sufficient grounds. At the present time (1983), there are two main categories of grounds for divorce.[20] The first includes the so-called "matrimonial offences" or faults that could give the other spouse grounds for an ***immediate*** divorce. These faults are: adultery, sodomy

(anal sex), bestiality, assault involving sexual intercourse, homosexual acts, bigamy and cruelty.

The second category includes the "marriage breakdown" cases, the most frequent by far being separation for three years. The others are: desertion at least five years previously, when it is the deserting spouse who wants the divorce; alcoholism; imprisonment for a total of at least three years; imprisonment of at least two years on sentence of death or sentence of ten years or more; addiction to narcotics; whereabouts of spouse unknown for at least three years; non-consummation of the marriage.

As 85 percent of divorce petitions are not even answered by the other spouse nowadays,[21] many people think these grounds encourage unnecessary bad feelings and hypocrisy. They would prefer to see the present adversarial atmosphere replaced by a no-fault procedure having a relatively short waiting period. The Canadian Advisory Council on the Status of Women has recommended a delay of one year when the spouses disagree, and no waiting period at all when both of them request the divorce jointly and there are neither support payments nor children involved.[22]

Stage 3 — Obtaining Custody, Support and a Share of Property

At the same time she presented Mary Ann's petition for divorce to the Supreme Court of Ontario, her lawyer also applied for interim alimony (for Mary Ann) and maintenance (for the children). The purpose of these support orders is to allow the family to live in the interval between the original petition and the trial.

The reason the court was being asked to determine the amount of interim support was that in spite of several attempts, Mary Ann and her husband had failed to agree on an amount. Mary Ann had prepared a very strict budget showing that she could not possibly stay in the house and make ends meet with less than $1,250 a month.

(Note: Statistics Canada's poverty line for a family of three in 1982 was $1,242 a month for a medium-sized urban centre.)[23]

Her husband, Jim, who was a mechanic earning $1,500 net a month, also produced a budget which showed that he needed $1,000 a month to be able to live at a minimal level, pay his work-related expenses (mainly his car) and continue to make payments on an old debt for items he had bought several years before. His statement also showed that his assets consisted of his car (worth $5,000), a $1,000 deposit in a registered retirement savings plan and

the unmortgaged part of the house ($10,000).

The judge had an impossible task. Saying that no useful purpose would be served by bankrupting Jim, he ordered him to continue to make the mortgage payments on the house ($400 a month) until the trial and to pay an additional $250 a month to Mary Ann for the rest of the family's needs. Remarking to Mary Ann that she was young and healthy, he suggested she try to find a job.

In the few months before the trial, Mary Ann thought she would go out of her mind. She tried to look for jobs, but found she couldn't do it without a baby-sitter for her two- and four-year-olds and she had no money to pay one. She only got by because her parents gave her some food. Unfortunately, her mother was not strong enough to baby-sit the children.

Shortly before the trial, her lawyer advised her to accept the following offer from her husband: a lump sum settlement equal to half the net proceeds of selling the house, along with $650 in monthly support payments, to be reduced to $500 two years later when Mary Ann would presumably be able to assume her own maintenance. She agreed, and those conditions were inserted the next month in the judgement granting her a temporary divorce decree (decree "nisi"). Three months later, she applied for and obtained a decree absolute and became a free woman again.

How typical is the case of Mary Ann S.? We will find out by examining the following elements:

- ☐ the division of property between the spouses
- ☐ the eligibility for support and the determination of its amount

Division of Property Between the Spouses

The property in our example consists of a house with a net worth of about $10,000, a $1,000 deposit in a registered retirement savings plan (RRSP) and a car valued at $5,000. Is this representative of couples who divorce after five years of marriage? The answer is yes.

Although no Canadian data exists on this, a recent American survey concluded that "The first and perhaps most important fact . . . about marital property is that many divorcing couples have little or no property to divide . . . Because most divorcing couples are relatively young and in the lower income groups . . . (this) should not be surprising."[24] Among the couples who divorced in 1977 in Los Angeles, less than half had ***any*** major assets such as a house, business or pension plan.

As can be seen in Table 3, the $16,000 of assets owned by Mary Ann S. and her

husband are quite typical of people married for five to nine years. Couples married for that length of time also make up the single largest category among the divorced, accounting for one-third of all divorcing couples in Canada.[25] The Los Angeles couples who were married less than five years had net (after debt) assets of $3,000, and those married 18 years or more had a net worth of $49,900.

Table 3

Assets of Divorcing Los Angeles Couples, 1979

Length of Marriage	Net Value of Assets (debts deducted)	Gross Value of Assets (debts not deducted)
Less than 5 years	$ 3,000	$ 4,600
5 to 9 years	14,200	21,800
10 to 17 years	46,100	47,000
18 years or more	49,900	62,600

In the relatively few cases where there are assets of some substance, how are they divided between the spouses? In Canada, this depends mostly on provincial matrimonial property legislation.

The most straightforward and predictable rules for the division of property on divorce in Canada are those which apply to spouses married under the standard partnership of acquests regime of the province of Quebec.[27] These can be stated quite simply:

- ☐ everything that spouses owned before their marriage, or acquired at any time by way of gift or inheritance, as well as personal items and tools used in their trade or profession, are separate properties that are ***not*** shared between them at any time
- ☐ everything else (with the exception of pension rights) is shared equally between them at the time of their divorce

In 1982, Quebec also enacted a new measure whose main effect seems to be to guarantee a minimal degree of protection to the more than 50 percent of Quebec wives who opted out of the basic sharing regime through a marriage contract. This provides for a "compensatory allowance" which a court can order one spouse to pay the other upon divorce "as consideration for the latter's contribution, in goods or services, to the enrichment of the patrimony of the former."[28]

At first it was expected that this provision would only be used in Murdoch-like situations where the wife had worked in the husband's business or on his farm. But at least two recent judgements have gone much further,

granting "compensatory allowances" to wives married under a regime of separation of property on the basis of their contribution to the marriage in the form of housework, dependent care and prudent management.[29]

The laws of the other provinces are all at least slightly different from each other, but common elements stand out:

- a basic principle of equal sharing of a given category of assets which vary from province to province
- a provision that contributions through money or work to a business or farm entitles a spouse to a share of it
- an overriding judicial discretion enabling judges to vary the equal shares established under the basic sharing principle (see above), or to include in them other categories of assets which are not subject to the equal sharing presumption

The result of this overriding discretion, which is much broader in some provinces than others (it is practically unlimited in Alberta and Saskatchewan) is that the outcome of any individual case is almost entirely unpredictable. Inasmuch as any pattern can be discerned in the cases reported so far, typical judgements follow roughly the pattern shown in Table 4.

As this table indicates, in the case of a couple married for thirty years or so in which the wife did all the work in the home and assumed all the child rearing tasks, the division of property between the spouses would go something like this on divorce:

Home and contents, car and cottage. In the absence of special circumstances, such as the home having been inherited from the parents of one spouse, the value of these assets would be divided equally in all provinces.

Pension rights. Along with the home, these rights to a future pension have now become the principal assets of many couples. In an important judgement from British Columbia (***Rutherford v. Rutherford***) where the husband was a middle-level civil servant earning $25,000 a year at the age of 52, for example, his pension rights — not including his credits under the Canada Pension Plan — were valued at $235,000.[31]

The wife in that case was fortunate because the law of British Columbia specifically states that rights under employer-sponsored pension plans (also called "private" pensions) are to be shared equally on marriage breakdown,[32] subject to judicial discretion, of course. Divorcing women from Ontario, Quebec, Prince Edward Island and Saskatchewan are not so lucky; the laws of the first

Table 4
Typical Distribution of Assets on Divorce In Long-Term Marriages, Canada[30]

	Home and Contents, Car and Cottage	Private Pension Rights	RRSPs	Businesses and Farms
B.C.	Shared equally	Shared equally	Shared equally	Shared equally if the wife worked both at home and outside. housewives get ¼ to ⅓
Alberta	Shared equally	Shared equally	Shared equally	Same as above
Saskatchewan	Shared equally	Not shared	Shared equally	Same as above
Manitoba	Shared equally	Shared equally	Shared equally	Same as above
Ontario	Shared equally	Not shared	Not shared	Shared equally if the wife worked both at home and outside: housewives get little or none
Quebec (partnership of acquests)	Shared equally	Not shared	Shared equally	Shared equally
New Brunswick	Shared equally	Probably shared equally	Probably shared equally	Shared equally if the wife worked both at home and outside; housewives get little or none
Nova Scotia	Shared equally	Probably not shared	Not shared	Same as above
P.E.I.	Shared equally	Not shared	Not shared	Same as above
Newfoundland	Shared equally	Probably not shared	Not shared	Same as above

IMPORTANT NOTE: Except for Quebec, the sharing described here is neither automatic nor guaranteed. See the text for further details.

three do not include pension rights in the assets that normally get shared on divorce, and the courts of Saskatchewan (unlike Alberta's) are still of the old-fashioned view that pension rights are not "property" because they cannot be bought or sold.[33] As for New Brunswick, Nova Scotia and Newfoundland, their new laws are still untested but it appears likely that New Brunswick will allow sharing of pension rights while the other two provinces will not.

The situation concerning rights under the Canada and Quebec Pension Plans (C/QPP) is unclear. Although the laws regulating those plans were amended to provide for the splitting of pension credits at the time of a divorce, upon application by either of the ex-spouses, surveys indicate that less than three percent of those who are eligible avail themselves of this opportunity. To correct this, the Canadian Advisory Council on the Status of Women has recommended that the splitting of C/QPP pension credits on divorce

become mandatory, automatic and not subject to renunciation.[34]

Registered Retirement Savings Plans (RRSPs). As far as women are concerned, RRSPs are in the same category as pension rights. They feel toward them the same way economist June Menzies said wives feel about pension plans: "When during the lifetime of a marriage a spouse contributes to a pension plan," she wrote, "both husband and wife are called upon to forego current expenditures to save for the future. Since there is a mutual current-sacrifice in the interests of future security, neither should be deprived of a right in that future security."[35]

For legislators, registered retirement savings plans are much easier to deal with than pension plans because they are considerably less complicated to divide. While it took years for German,[36] then American,[37] and finally Canadian[38] judges to learn to read actuaries' reports on the value of pension rights and to determine which of the various possible means of giving wives a share in them is most appropriate in particular circumstances, they had no such difficulties with evaluating and dividing deposits in RRSPs.

This is why these deposits have long been shared on divorce in Quebec and are now part of the shareable assets in all the western provinces. In Ontario and the Atlantic provinces (with the exception of New Brunswick), they are treated like business assets which do not usually get divided between ex-spouses.

Business Assets and Farms. This is the category that gives the clearest indication of the value a society places on its women's work. In the eastern common law provinces (Ontario, New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland), the philosophy behind the law is that homemakers are definitely ***not*** equal partners in the marriage relationship. The implication of the Supreme Court of Canada's decision in the ***Leatherdale*** case[39] is that unless an Ontario woman has a job outside the home, she should not normally expect to be awarded a share of her husband's savings or business assets when they divorce.

If she did work outside while also doing all the domestic and child care tasks at home, her contribution will be evaluated on a case-by-case basis.

Western provinces are somewhat more egalitarian, although still very far from the basic assumption of the Quebec standard matrimonial regime that the work both spouses do has exactly the same value whatever the distribution of tasks between them. Judgements from British Columbia to Manitoba seem to follow the same rule: if a woman is a farmwife who works in the home and in the fields too, or if she is a mother who does all the housework and child caring as well as working without pay in her husband's business, she will be recognized as having worked as hard as her husband and will be awarded half the property both of them earned during their life together. But if she was "only" a housewife, no matter how hard she worked, she cannot hope to get an equal share of the farm or business accumulated during their marriage.

This pattern is clearest in Saskatchewan's decisions relating to the division of farm properties. A researcher noted:[40]

> The farmwives whose contributions have been perceived as the equal of their husbands' . . . have participated in the day-to-day work of the farm in such ways as working on the land or with the livestock, driving machinery, doing bookkeeping and so forth. Often these wives have also contributed financially through monetary gifts and inheritances and employment income. Such activities have been termed "greater than the normal contributions of the average housewife."
>
> In . . . cases where numbers of children and lack of modern facilities have resulted in little time available for farming labours, the wives have received lessened awards, notwithstanding that the judges have recognized that the wives had few options in the matter . . . In **Kinzel** v. ***Kinzel*** the wife cared for two adults and six children in a building without electricity, running water or indoor plumbing. She received 41.6% of the increase in value of the property during the marriage.

As the property in the Kinzel case included the matrimonial home and its contents as well as the farm land and equipment, her actual share of the farm business was probably no higher than a third.

This brief review of Canada's rules for the division of property on divorce reveals that the present system suffers from many serious drawbacks. The worst ones are:

The ***unequal treatment of wives,*** particularly of homemakers. When a Gallup poll asked Canadians in 1977 whether they believed that upon a divorce each spouse should get half of the assets accumulated by them during the marriage, 63 percent of the men and 74 percent of the women answered "yes," and only five percent of the men and three percent of the women answered "no."[41] If public opinion favours equal sharing, then why do nine provinces have extremely complicated systems that give women much smaller shares

than the men? The explanations probably are that old traditions die hard and that the male legislators who make such decisions are less sympathetic to women's rights than the general population.

The ***unpredictability*** of the financial consequences of a marital breakup, with very similar situations producing wildly different results. Who wants to enter into a partnership without knowing the terms under which it will end? Many women justifiably feel that the present case-by-case approach is a constant whip held over their backs throughout the marriage. How can it be otherwise when the decision over whether or not a woman will get a share of the family's life savings is made over matters such as "who changed the diapers and who cut the grass"?[42]

The heavy ***reliance on judicial discretion,*** supposedly to ensure "fair and equitable" results. Instead, what it most often produces is anarchy and arbitrariness, with each judge free to apply his (seldom her) personal prejudices to the case at hand. As women have learned through long and bitter experience, an overwhelmingly male judiciary is ***not*** a body they can trust.

Upon evaluating the American family property system, which has many similarities to ours, Professor Mary Ann Glendon concluded as follows:[43]

> There are really only two basic questions: What property should be subject to division? How much discretion should a judge have in allocating whatever property is subject to division? It would seem that under present social and economic conditions in the United States the rule of choice should be the old community property rule of equal division limited to property acquired by gainful activity during the marriage, in the absence of agreement to the contrary.
>
> It is difficult to defend this as a rule of fairness, given that the economic or other contributions of persons associated in marriage are never precisely equal. But given what is just as true — that no human judge can ever ascertain or quantify the true contributions of each spouse — the equal division commends itself as a rule of convenience without substantial demerit. It has the additional advantage of linking the scope of property sharing to the duration of the marriage. It avoids the unpredictability of leaving property division to judicial discretion, thereby exposing the fortune or future of the parties to the vagaries and expense of the adversary process, the competence of counsel, and the luck of the judicial draw . . .
>
> Equal division of acquests would also discourage, to a large extent, the rehashing of the history of the marriage which is invited by "guidelines" to judicial discretion. Finally, it has the merit of serving as a framework for private ordering of the financial aspects of divorce by enabling the spouses to know what the likely result will be if their affairs are settled by a judge.

This certainly makes a great deal of sense. Canadian women would be much better served by matrimonial property laws drawn up along such lines.

The only question still remaining concerning property division is whether or not other types of income-producing "assets" such as

job experience, a professional education and the goodwill value of a professional practice should also be evaluated and included in the "pot" to be shared between the spouses on divorce. Many American courts[44] and at least one Canadian judge[45] have answered "yes."

The main rationale for including such items in the shareable property is that in many families, including most families with a single earner, the husband's career is the main focus of all activities and thus truly the product of the joint efforts of both spouses. Even in two-earner couples, it is argued, it often happens that both spouses, "as a marital unit, chose to give priority to one person's career and that they both expected to share in the benefits of that decision."[46]

According to family law experts Henry Foster and Doris Jonas Freed,[47] the real cause of the present efforts to stretch the definition of "matrimonial assets" to include the broadest possible range of items is the need to compensate women for the loss of bargaining power they have suffered with the introduction of no-fault divorce. With divorces becoming almost automatic and support awards for ex-wives getting smaller and of shorter duration, Foster and Freed say, many women, and particularly "the thousands of wives who opted for marriage as a career," are turning to property division in a desperate attempt to find some degree of financial security in a very insecure world.

We will return to this question in our discussions concerning the trends which are developing in the area of support obligations.

Eligibility for Support and Determination of Its Amount

Mary Ann's support payments amounted to $650 a month for two years and $500 after that until the children were grown, out of her ex-husband's net salary of

$1,500 a month. This meant that he got to keep $850 for himself, or 57 percent, which seems quite unfair since he only had himself to support while Mary Ann had to support three people.

Is this type of support order typical? The answer is no. Mary Ann's support payments were ***considerably higher*** than average. For one thing, the $150 a month for her own support for two years, although modest, was very unusual. A recent major survey of support payments in Alberta found that only five percent of ex-wives received periodic awards for themselves. Even when dependent children were involved, still only 18 percent of ex-wives were granted such awards.[48]

Child support is much more common. In the Alberta cases involving dependent children, 65 percent of the custodial parents were awarded periodic amounts for the children. These amounts were usually much less generous than Mary Ann's award of $250 per child per month. Nearly half the Alberta awards were between $101 and $200 per child per month. The next largest category (38 percent) was between $51 and $100 a month.[49]

These results are similar to those of a California study which found that child support payments generally amount to about half the minimal cost of bringing up a child.[50] The inevitable result is that the parent with custody, who is almost always the woman, ends up bearing a disproportionate share of the burden of raising the children. The real situation is in fact much worse because these estimates take for granted that the support awarded is being paid, which is an overly optimistic assumption. They also do not take into account the cost of the children's supervision, either in child care expenses (about $250 a month per child in Canada) or foregone income for the mother who is taking care of them at home.

Inflation causes another problem. The real value of Canadian support awards goes down from year to year because many judges refuse to order automatic increases unless there is a clause to that effect in a separation agreement.[51] One notable exception is Ontario judge Rosalie Abella, who orders such clauses because "they make sense." She cannot be accused of harshness towards husbands because the formula she uses — automatic increase by the ***lesser*** of either the rise in the cost of living or the actual rise in the husband's own income — is so reasonable that even husbands admit it is fair.[52]

Getting back to Mary Ann's support order, we find that in spite of its inadequacy, it was so high in comparison with normal North American standards that the colleagues

of the judge who awarded it might brand him a closet feminist. Instead of the 43 percent of her ex-husband's income that Mary Ann was given, average California support orders hover around the one-third mark, from a high of 37 percent when the husband is making $10,000 a year to a low of 19 percent for those making more than $50,000.[53] Canadian awards appear to be even lower: a Statistics Canada study found that the average amount here is about 20 percent of the husband's net income, while the median amount is closer to 17 percent.[54]

Several studies have confirmed the depressing implications of these figures, which are that husbands are much better off after a divorce than their former wives and children.[55] This is graphically illustrated in Table 5, which shows that when a divorce takes place, the wife's household suffers a much greater reduction in overall income than the husband's, with the gap being largest for families whose former income levels were the highest.

Even with support payments subtracted from the husbands' incomes (whether they paid them or not) and added to their ex-wives', we see that among families where pre-divorce incomes were between $30,000 and $39,000, the wife is reduced to less than 40 percent of the former family standard while the husband maintains 78 percent. The only exception is for families with pre-divorce incomes of less than $20,000, where the households of wives and husbands both end up with about three-quarters of their former level. This is probably because the wives in that group are most likely to receive government assistance or to have taken paid employment after the divorce.

Table 5 (third column) also shows that when the post-divorce, post-support incomes of the spouses are divided by the number of people in their new households, the gap between former and present standards of living of ex-wives and ex-husbands becomes a gulf. This is the result of the husband keeping most of the family's money while the wife takes charge of all its dependents. The inevitable outcome, as these per capita figures show, is that while the standard of living of wives and children collapses upon marriage breakdown, that of husbands rises to the point of giving them almost twice as much disposable income as they had before their families split up.

It is no wonder that these figures have led some people to say that it is not feminism, or the disappearance of old family values, which is causing the dissolution of so many marriages today, but the simple fact that the present system, with its easy divorces and very low support awards, is providing large numbers of

Table 5

Post-Divorce Median Incomes of Couples Married Less Than 10 Years, Los Angeles County, 1978[56]

Pre-Divorce Annual Family Income	Post-Divorce Median Income, in Dollars and as a Percentage of Pre-Divorce Family Income[57]		Post-Divorce Median *Per Capita* Income, in Dollars and as a Percentage of Pre-Divorce *Per Capita* Family Income[58]	
	WIFE	HUSBAND	WIFE	HUSBAND
Under $20,000	$ 9,067 (71%)	$11,440 (74%)	$ 7,025 (129%)	$11,440 (176%)
From $20,000 to $29,000	$13,000 (56%)	$18,050 (78%)	$ 8,917 (87%)	$16,050 (165%)
From $30,000 to $39,000	$15,000 (39%)	$27,000 (78%)	$13,050 (77%)	$27,000 (176%)
$40,000 and Up	$18,000 (29%)	$45,718 (75%)	$12,000 (48%)	$45,718 (201%)

men with a strong financial incentive to abandon their wives and children.[59] Since making divorces harder to get at this stage would only lead to more desertions without divorce and higher rates of common-law unions, the only ways to make the present system more neutral toward marriage are improved support laws and greater intervention by governments to lighten the burden of parents before their marriages break down.

While numerous feminist briefs have documented the urgent need of assistance to parents in the form of parental leave and benefits and subsidized 24-hour-a-day child care services, no women's groups have yet done in-depth studies of the issues involved in reforming our inadequate support legislation. Most probably, it is because support is a complicated area that even lawyers shy away from. As someone wrote recently, the whole field of family maintenance "is an example of a messy social situation apparently met by an equally messy legal response."[60]

Apart from the thorny problem of the enforcement of maintenance orders, which will be discussed in the next section, the most difficult questions relating to support payments are: What are these payments for? How much should they amount to? How long should they last?

It is interesting to note that Canada's Divorce Act of 1968 gives no idea of what the rationale of support awards is supposed to be. It simply states that a court may make an award order "if it thinks it fit and just to do so having regard to the conduct of the parties and the conditions, means and other circumstances of each of them . . . ."[61]

In the case of maintenance for children this no-rule approach is no problem at all. Everyone agrees that young children are of necessity dependent on their parents and thereby entitled to continuing support from them.

When it comes to maintaining spouses, though, the absence of clear guidelines leads to a most undignified free-for-all. Family court judge Rosalie Abella has called the effects of our spousal support provisions "a Rubik's cube for which no one yet has written the Solution Book. The result is a patchwork of often conflicting theories and approaches."[62]

Matters were not helped by a November 1983 decision by the Supreme Court of Canada (***Messier v. Delage***)[63] which made it public that even the members of that august body were deeply divided on what spousal support should do. The case involved a woman who stayed home with her two young children for the duration of her 12 year marriage, after which time she returned to school and completed a master's degree in translation. At the time of the trial, she was 38 years old, had custody of one daughter aged 15 and found herself unable, in spite of reasonable efforts, to obtain more than part-time work paying her about $5,000 a year.

The question posed to the court was: Should Ms. Delage's ex-husband, a psychiatrist earning $70,000 a year, continue to be held responsible for his wife's support? The majority judgement of the Supreme Court, which rallied four of its most conservative judges, answered "yes." The minority of three, including former Law Reform Commission of Canada chairman Antonio Lamer and first female Supreme Court Justice Bertha Wilson, answered "no."

The most interesting things about this judgement are:

- the criteria invoked by the minority to support its opinion have been embraced by the government in its proposed reform of the Divorce Act
- from a feminist point of view, both the majority and the minority decisions leave much to be desired

On the one hand, to oblige a man to support a young and healthy woman indefinitely, perhaps for life, because they were once married for a relatively short time, is clearly unfair and contradicts women's demands for equal treatment. On the other hand, it is also very unfair to say that five years of retraining yielding a welfare-level income is adequate compensation to a woman who had been promised that she would be taken care of for life, and who on that assumption neglected her own career to devote 12 years on a full-time basis without pay to making a man's life comfortable and filling the

role of parent on behalf of them. In this case, the woman is forced to bear the full burden of the disastrous financial consequences of choices that were made by both spouses.

In arguing that an unemployed "employable" ex-wife is "the responsibility of the government rather than the former husband," Justices Lamer, McIntyre and Wilson said they were following the criteria for support laid down by the Law Reform Commission of Canada in 1976. These include:[64]

- ☐ The abolition of the old rule giving a former wife an almost automatic right to support. The new starting point is that ***each spouse is responsible for himself or herself.***
- ☐ The statement that the purpose of spousal support is ***rehabilitation*** to overcome the disadvantages caused by the marriage, these disadvantages being reflected in the spouses' ***reasonable needs*** arising from:
  - the division of tasks within the marriage
  - an understanding between the spouses that one would support the other
  - custody arrangements for the children
  - disability affecting a spouse's capacity to earn
  - inability of a spouse to get a paid job
- ☐ The establishment of ***temporary*** rather than permanent support as the norm, with the ex-spouse being obliged to become self-supporting as soon as possible unless special circumstances, such as advanced age or disability, make it unreasonable to expect it.
- ☐ The disappearance of ***conduct*** as a criterion for granting support, except when it affects a spouse's needs or has the effect of unreasonably prolonging her/his dependency.

At first sight, these criteria seem reasonable, but their

application in numerous cases in Canada in the last few years has led to many flagrant injustices. Typically, according to a lawyer specializing in family law:[65]

> The dependent spouse is expected to become self-supporting within one to three years, no matter how long she has been out of the paid labour force or how obsolete her skills.

Tish Sommers of the Task Force on Older Women of the National Organization for Women reports similar judgements in the United States. In a case where a woman in her fifties was denied support for the reason that she should be able to find paid employment, Sommers writes, the only job the desperate ex-wife was able to find was as a baby-sitter in her former husband's new two-career home.[66]

Long-term homemakers in their forties and fifties are understandably traumatized by deadlines on their support payments:[67]

> These women are terrorized by the idea of a limit on the maintenance paid to them, even if it is two or three years away, as they cannot see themselves as able to provide financially, and they are greatly concerned about their retirement years. All the publicity tells them that they will be old and poor.

In legal circles in Canada, lines are increasingly being drawn between the advocates of two positions. On the one hand, there are the supporters of the "clean break" principle, whose main identification is with the poor victimized ex-husbands dragged down by the millstones of their former marriages. On the other hand, an uneasy alliance of conservative judges and feminists is trying to limit the damages caused by an overeager application of the self-sufficiency rule. To complicate matters further, there also exists a small group of feminist lawyers who support the "clean break" principle because they feel all women should be pushed to work outside their homes.

The most eloquent proponent of the "clean break" is Professor Julien Payne of the University of Ottawa. He writes that:[68]

> There is a growing inclination in the legislatures and the courts to regard spousal maintenance as "rehabilitative" in character, if the dependent spouse has a reasonable prospect of achieving financial independence. When such a finding is made, it is submitted that the court should direct its mind to the feasibility of ordering a lump sum payment in final settlement of all future maintenance rights . . . The advantage of adopting this course of action is that it cuts the marital umbilical cord and makes it clear to both spouses that they will be financially independent of each other in the future.
>
> Where a lump sum payment is not appropriate but periodic payments are intended to be rehabilitative, a fixed term should be imposed on the maintenance order. It is submitted that fixed term orders should be of relatively short duration. Normally, they should not exceed a period of two or at most, three years. There must be light at the end of the tunnel for the payor and an immediate incentive for the payee to achieve financial independence.

The problem is that such drastic treatment of a woman who has been a full-time homemaker for fifteen or twenty or more years is more likely to produce a nervous breakdown. Payne also does not define what he means by

"reasonable prospects of achieving financial independence." This is left up to judges to decide, presumably because of their "obvious" expertise in the areas of female retraining opportunities, older women's chances of finding jobs and the evolution of labour market conditions!

Judge Rosalie Abella has different views:[69]

> We must be wary, in attempting to encourage speedy economic recovery and financial independence, about finite support orders that bear no relationship to a spouse's history. In 1979, 16% of the divorces involved women over 45 years of age, women conditioned by expectations of another era, women who could not at that age be expected to easily merge with the labour force. It is a shibboleth to expect that they will easily become economically independent within a fixed period of time. When one considers too that of the younger women who separate or divorce, many have young dependent children, and when you consider that many of them too had expected that their role on a full-time basis would be to raise these dependent children, it is unrealistic to expect that they will be able to make the financial and psychological quantum leap to a well-paying job. In many cases, babysitting expenses alone will be more than the after-tax wages of a job available for unskilled workers. Moreover, it is difficult to see how a court can determine at what stage a mother or father should enter the labour force and abdicate parenting responsibilities for preschool children. In most homes this decision will be made in any event by the economic realities in the household. If the mother finds that the income she is receiving from her husband on a periodic basis is insufficient to allow her to meet her monthly needs, she will likely find herself having to go out to work. This is different, however, from the court, by an arbitrary judgment as to when she must become financially independent, imposing upon her an entry into the labour market. How can a court speculate as to the child's welfare in these circumstances? It is more practical to leave the term of support open and subject to variation in the event that there has been a change in circumstances.

The most disquieting thing about these various approaches and philosophies (including both the majority and minority decisions of the Supreme Court) is that ***all of them*** are compatible with the criteria proposed by the Law Reform Commission of Canada.

A similarly long and flexible list of criteria in Britain has made critics remark that:[70]

> (E)very conceivable permutation of circumstances is catered for and yet there is no guidance whatsoever as to which of the multiplicity of factors should have priority.

These critics conclude that wide-ranging criteria with no rule concerning the weight to be attributed to each adds up to the same thing as having no criteria at all. The result is again full judicial discretion, or one more instance of "Parliamentary buck-passing to the courts."[71]

British jurist Olive Stone shares the view of American and Canadian feminists that judicial discretion is bound to be disadvantageous to women:[72]

> In the light of history, and of recent experience in England and New Zealand, my personal view . . . is that women should not hand over to an overwhelmingly male judiciary questions about who provides the next meal and how.

Proposals for an alternative system come under two different categories. The first would provide much more

specific guidelines indicating the weight to be given to certain criteria in well-defined circumstances. The second category would abolish the present system of support payments for wives altogether and replace it with an objective system of compensatory payment based on a calculation of the financial loss a woman suffered as a result of assuming the wife/mother role.

In the first category, American sociologist Lenore Weitzman has proposed that divorce laws clearly state the following:[73]

When ***young children*** are present, the overriding criterion in granting support to the family should be to allow the children to maintain the same standard of living as their wealthier parent. If the father (assuming he is the non-custodial parent) can afford it, the wife should be allowed to keep the home and be a full or part-time homemaker until the children are at school, if that's what the couple had originally planned.

When the ex-wife needs/wants ***retraining*** to re-enter the labour market or improve her position in it, she should be entitled to a number of years of "balloon" payments allowing her to subsidize her education up to and including post-graduate studies. Short-term training, which has the effect of streaming women into low-paying female ghettoes, should be actively discouraged.

In the case of ***wives aged 45 or more*** who spent most of their lives devoting themselves to fulfilling their children's and husband's needs, the main criteria in granting support should be justice and the desirability of equalizing the standards of living of the ex-spouses for the rest of their lives.

This approach would also be accompanied by a broadening of the terms included in the assets to be divided between the spouses on divorce. It would reduce the importance of "the discretionary, inadequate and precarious ***favor*** that is today's alimony" and give women more "rights" as opposed to "privileges."[74]

Other than pension rights, which are now treated as matrimonial property in many Canadian and American jurisdictions, two main "new" assets have been targetted for sharing on marriage dissolution. The first is "goodwill," which is defined as "the expected future income or opportunity for income that results from the person's past efforts," and the second is the value of professional diplomas or licences.[75]

The issue of professional degrees or licences has most often arisen in the United States in cases where the wife had put her husband through university and the marriage broke up soon afterwards. At that stage, the couple is typically quite poor and in debt, with the husband's degree (in law or medicine or whatever) clearly being their most important investment.

The courts of many American states have awarded the wife compensation under the heading of property division in such situations.[76] Some simply calculated the direct and indirect costs of the husband's education and ordered him to reimburse the wife. Others went further, evaluating the additional income the degree would provide the man for the rest of his working life and granting the woman a share of it. A third possible way, rarely appropriate, is "to award the lesser-educated spouse an equivalent educational opportunity." This was granted in one New York case but reversed on appeal.[77]

The "goodwill" approach is for longer relationships or those where no special education was required or obtained during the marriage. It reflects the fact that the main asset of most couples is not their house or other tangibles, but rather the husband's capacity to earn:[78]

> It's like the image of the fish and the fishing pole. She gets the fish, which will give her something to eat for a while, but he gets the fishing pole to continue to fish. Should not that pole be considered community property?

In her survey of California judges, Lenore Weitzman found that:[79]

> The judges we interviewed had found goodwill in the professional practices of an accountant, architect, banker, consultant, dentist, doctor, engineer, insurance agent, lawyer, pharmacist, professor, sales representative, social worker, and in a wide range of small and large businesses including a barber shop, hardware store, restaurant, indoor sign business and beauty salon chain.

Weitzman argues that while no court has yet recognized that a similar career asset exists for salaried employees, it could do so easily by using the same evaluation methods as in cases involving personal injuries and workers' compensation. In these situations, the value of seniority, union membership or a steady job are often taken into account to predict future incomes and thus assess the appropriate compensation.[80]

When asked how they calculated the value of goodwill for self-employed

people and small businessmen, judges report using several approaches, but many "frankly admitted that the goodwill value is often set to equal the equity in the family home."[81] Through this type of accounting, the wife can be given the home, which is often what matters most to her, without having to give up her rights over other irreplaceable assets such as future pension benefits for her old age.

While supporting the changes described above for the short term, many feminist lawyers, law professors and other people are of the opinion that they do not go far enough because they still leave an enormous range of decisions to be made through judicial discretion. What these people want to see implemented, in the long run, is an objective mechanism of "equalization payment" that would settle the financial affairs of ex-spouses objectively and clearly once and for all.[82]

The basis for these "equalization" proposals is the economic theory of "human capital." Simply put, "human capital" is a person's value on the labour market. It goes up with training and labour market experience and depreciates when the person stays away from the market for any length of time. Under our present rules for financial settlements on divorce, it is argued, the husband is allowed to retain all or most of the benefit of the enhanced earning power he acquired through both spouses' efforts during the marriage, while the wife is made to bear the full burden of the depreciation of her human capital that occurred because of the couple's decision that she would assume most of the domestic and child care tasks of the family.

Of the several formulae[83] proposed to calculate the "equalization payment," the most thorough emanates from Professor Combs of the University of Nebraska, who suggests assessing the husbands' gains and the wives' losses in human capital and the resulting debt between them as follows:[84]

Step 1. Establish the yearly income each spouse was earning at the time of the marriage or, if one or both were not fully employed, the income they could have earned on a full-time basis with the qualifications they then possessed. Update the resulting amounts by increasing them to account for the rise in the cost of living between the time of marriage and the divorce.

Step 2. Determine in the same manner the yearly full-time income each spouse is making or could be making at the time of the divorce.

Step 3. For each spouse, calculate the change in income that took place between the year they married

and the year they divorced. This will give the yearly gain or loss in earning power of each of them during the marriage. As this gain or loss is expected to affect their earning powers for the rest of their lives, calculate the total effect of marriage on their earnings by multiplying the yearly gains or losses of each spouse by the number of years she or he is expected to remain in the labour market.

Step 4. The lifetime gains and losses of both spouses are then added together and divided by two. The result is each spouse's share of the human capital investment/depreciation due to their activities during the marriage. Finally, "The spouse with the net investment gain retains the full benefit of his or her enhanced earning capacity and so compensates the spouse bearing the loss of reduced lifetime earnings by paying (her or him) one-half of the couple's net gain."[85] Whether this half of the net gains was paid in a lump sum or through periodic payments, it would be a debt that could not be reduced by subsequent events (nor through bankruptcy, if it is to be effective).

Table 6 gives an example of how this would work. The spouses in this example are of the same age. They were married at age 22 and divorced at 40, and throughout the marriage he was a full-time earner while she did all the housekeeping and child care work and held a part-time paid job.

The result of the calculations is that he would owe his ex-wife an equalization payment of $87,500. If he paid her this amount at a rate of $8,000 a

Table 6

Calculation of Equalization Payment to be Paid on Divorce

	HIM	HER
Net earnings in the year of the divorce (calculated on a full-time basis)	$ 20,000	$ 7,000
Net earnings during the year they married (updated for inflation)	14,000	8,000
Yearly gains/losses incurred during the marriage	+ $ 6,000	- $ 1,000
Number of years they are expected to have earnings in the future	x 25	x 25
Lifetime gains/losses due to the marriage	+ $150,000	- $25,000
Equalization payment due by him to her:	$150,000 + $25,000 / 2	= $87,500

year (40 percent of his net income), his debt would be fully paid off in 11 years, at which point his responsibility towards her would end no matter what her needs or his resources. Depending on the circumstances, this could amount to a greater or smaller total than such a divorcing husband would have to pay under the present system.

There are three main advantages to the "equalization payment" approach.

First, women and men would know what to expect when they chose to adopt a particular lifestyle. As a Florida judge said in 1977, the present system's failure to compensate women for the disparity in the spouses' earning capacities on divorce would require "society to reclassify the traditional all-American concept of Mom and apple pie and relabel it a most hazardous occupation that all young girls should be dissuaded from."[86]

Second, the rules regulating the financial consequences of marriage breakdown would be up-front and clear, which would go a long way toward dispelling the (accurate) feeling of many ex-husbands and ex-wives that the present system is arcane, unfair and arbitrary.

Third, and most important, the "equalization payment," unlike support, would not be subject to reductions when ex-husbands decided to marry and start new families. In Canada, as in most western countries, the law now grants a reduction in support payments to husbands who remarry and take on new dependents. The reasoning of the courts in making such decisions is that:[87]

> Otherwise, this would mean that the only persons capable of remarrying are those who can afford it, and that there would be two weights, two measures, which are: on one side the rich who could remarry because they can afford it, and on the other side the poor or economically weak who could not remarry because of obligations imposed by the judgment granting the divorce . . .

With all due respect to the courts, this is nonsense. Debts incurred to buy golfing equipment, for example, are not susceptible to being reduced because of a change in the debtor's marital or family status. The only protection ordinary debtors have is the right to retain a minimal portion of their wages to support themselves and their families at subsistence levels. Maintenance obligations should not only be equal to other debts, they should have priority over them and be granted the additional advantage of not being wiped out by bankruptcy, as is already the case with periodic support payments.

If family obligations were clear and predetermined by means of fair and aboveboard criteria, women who married men with such debts would know exactly what to expect for the future. If the men's obligations were heavy ones,

they would be in exactly the same position as all the other poor men in the world who have trouble finding themselves a wife.

But even if all these issues concerning the eligibility for, and type of, support payments for spouses were settled, two big unsolved maintenance problems would still remain: erratic determination of the ***amount of support***; and poor ***enforcement***, which will be seen in the next section.

On the question of the courts' choice of the amount of support, the Manitoba Law Reform Commission commented in 1976:[88]

> We think that sometimes the payment of child support is assessed and awarded at unrealistically low amounts. People, including the father who is paying court-awarded child maintenance, complained to us that in some areas of the province child maintenance is being fixed by the court as low as $25 per month.

Furthermore, as found by a Vancouver study, support awards are not only extremely low in relation to needs but they "remained constant in the seventies; that is, (they have) not kept pace with rises in the general wage structure or the cost of living."[89]

The Vancouver researchers (two out of three of whom were male) concluded that "The reported mean size of awards is so meagre as to arouse suspicion that the focus is much more on the needs of the non-custodial parent than on his obligations."[90] In other words, judges identify more with the needs of the fathers than with those of the mothers and children. The situation is even worse than it seems because when men who don't pay are summoned to appear before the courts to explain why, they typically offer irrelevant and unconvincing excuses but are nevertheless allowed to get away with nonpayment of all or part of the accumulated arrears.[91]

After reviewing all the information available on American and Canadian support payments, expert Judith Cassetty of the University of Texas concluded that:[92]

> There are no readily discernible implicit or explicit standards for support payments . . . There is enormous variance between and within jurisdictions in both orders for support and payment performance . . .
>
> As an analogy, I ask you to imagine what the level of compliance with income tax laws would be like in the population as a whole if there were no tax schedules and the amount of individual liability were to be established through an adversarial process on a case by case basis . . .

The economist-lawyer team of Kenneth White and Thomas Stone, when analyzing such judgements in Florida, found that each judge had developed his/her own guidelines and followed them consistently. The problem was that no two judges were using the same guidelines, with the overall result that "(C)onsistency as to what constitutes equity is absent from divorce and/or dissolution of marriage cases."[93]

These findings led White and Stone to start work on developing a computer model that would include all the relevant information concerning the needs and means of the parties and calculate the optimum amount of support. If such a system were used, they say, it would: ensure a more equitable treatment of all the parties involved; increase respect for the judicial system; reduce the severe hardships and psychological damage caused by the present frequently inequitable distribution of resources; and save a great deal of court time that could be better spent on matters upon which judges are more competent to decide.[94]

Many other researchers, notably Judith Cassetty[95] and Isabel Sawhill of Washington's Urban Institute,[96] are also working on developing objective standards for the determination of alimony and support amounts. Sawhill points out that "all standards must be based on value judgements" and that their development makes it necessary to clearly express all the assumptions on which they are based, thereby allowing "a more intelligent debate on these matters."[97]

If anything stands out clearly on this question of determination of support amounts, it is the urgent need for an intelligent public debate if we are to arrive at equitable solutions.

Stage 4 — Default and Collection

After the divorce, Mary Ann's life became quite austere: no new clothes, very little meat, no more disposable diapers. She scrubbed her small apartment, laundered, cooked, and watched television. When she called the day care office to find out if she could leave the children somewhere while she looked for a job, she was told that the waiting list was eight months long "and getting longer because of the cutbacks."[98] Her parents bought her a portable typewriter and a "How to" book on typing.

Within a year Jim and his girlfriend, who was a sales clerk in a store, bought a small house with a big yard outside the town. When the children, who were then three and six years old, were taken there to spend the occasional weekend, they had a wonderful time and didn't want to go back home. They didn't understand why their mother's place was so much smaller and less happy than their dad's.

Because Jim now lived further away, his contacts with the children gradually became less and less frequent. When the improvements he was making to his new home cost more than anticipated, he started to "forget" to send in his maintenance payments. After returning to legal aid and

to her lawyer, Mary Ann finally applied to the family court to enforce her judgement. The process was time-consuming and slow, but as Jim didn't want to go to jail or have his salary seized, he paid up in the end. In an attempt to avoid further trouble, Mary Ann invoked the Ontario courts' powers of automatic enforcement so that henceforth Jim would make his payments directly to the court which would forward them to her.

However, Mary Ann soon found out that this wasn't going to work very well. The system was slow in forwarding her payments and months behind in monitoring delinquents. Instead of being a passive recipient whose cheque was regularly forwarded, she found herself in the disagreeable position of continually having to goad the court clerks into sending reminders or summons to her ex-husband who would always pay at the last minute.

Still, she was told, she was fortunate compared to divorced women from the other provinces, who must usually start collection procedures anew month after month at considerable financial and emotional cost. The only exceptions are Manitoba, which has a computerized system that routinely uses "everlasting garnishee" orders forcing employers to continually deduct the support payments from salaries and send them to the courts,[99] and Quebec, where a special collection service tracks down defaulters and seizes their wages for as long as a year after a missed payment.[100]

The following example, related by a member of Parliament from British Columbia in the House of Commons in 1981, illustrates the difficulties ex-wives can encounter:[101]

> I know of one case . . . which involves a marriage break up. In this case the husband left, moved to another province and then returned. He was well-to-do and had plenty of resources.
>
> He was called upon by the court to pay alimony and child support. He would refuse to pay this money until the former spouse went before the court to collect it. Then, on the last day, he would make that payment to the court. He would wait long enough before paying the money to force her to pay out most of it in legal fees. The next month he would do the same thing.

Under these systems, default is so widespread that it has inspired the Law Reform Commission of Canada to write the following much-quoted passage:[102]

> Something is profoundly wrong with a body of law and practice that fails to attain its objects more often than it succeeds. Failure is the universal characteristic of the traditional system for enforcing maintenance orders in Canada . . .
>
> The burden of this social evil is and always has been carried by women, most of whom are found in the least economically influential strata in Canada . . . .

This was emphatically confirmed by the recent survey of maintenance orders in Alberta. It revealed that only a third of the women received the full amount of the court-ordered support. Another third

received less than the full amount, and the final third never received a penny of the ordered support.[103] This was consistent with the results of all the other studies of this type carried out in the last few years in North America.[104]

One of the main reasons why little effort was made to collect support payments for so long was the widespread belief that most men who default on maintenance orders cannot afford to pay. Much was heard about the fact that "you can't get blood from a stone." In a 1981 debate in the House of Commons, government spokesman Ron Irwin explained the federal government's lack of eagerness to do something in this area by saying that "I suggest that in 50 percent of the cases there is nothing at the end of those (enforcement) processes because there was nothing there at the beginning."[105] M.P. Bob Rae agreed, saying that in most cases, "there ain't nothing there."[106] Irwin further likened collecting maintenance payments to "putting one blanket over two beds."[107]

As it turned out, however, these impressions were again a case of men identifying with other men's problems. Study after study of maintenance defaulters found that more than 80 percent of those who fail to pay are in fact able to do so.[108] This does not mean that most ex-husbands are well-off, but that their capacity to pay was already taken into account (and usually underestimated, as we saw above) when the amount of the order was determined.

In her major study of support payments in the United States, Judith Cassetty concludes that about one to three percent of fathers can contribute nothing at all toward the support of their children by former unions, but that:[109]

> Most fathers can make some economic contribution to their former families, and this contribution might be much, much larger than has been believed possible . . . The fact remains that by either basic measure of economic well-being used here, there appears to be an enormous untapped source of funds that could be used to improve the economic status of children in female-headed households

Another myth about defaulting support debtors is that most of them skipped town and are impossible to find. To the surprise of the authors of the Alberta maintenance study, half of the defaulters were found by

using sources such as the telephone book and addresses from the Motor Vehicle Bureau.[110] Another 25 percent were tracked down "without using extensive tracing techniques."

Quebec's two-year-old support collection agency reports even better tracing results. Indeed, say the program's administrators, one phone call from their office is enough to settle a full third of their caseload.[111] Another 50 percent of defaulters comply within a few weeks or months of persuasive use of measures such as wage garnishment (reported as the most efficient) and seizure of their property. Only 20 percent of cases remain unsolved.[112]

As reports from relatively successful systems such as those of Manitoba and Quebec indicate, collection of maintenance payments is far from being an impossible task. All that is required is a sufficient degree of commitment on the part of governments. Specifically, experts say, an effective enforcement system must have the following essential elements:

1. It must be ***self-starting***, meaning that it must not be dependent on a complaint having to be filed by the woman. David Chambers, who did an extensive analysis of child support enforcement in Michigan, found that this was one of the most important reasons why that state has the highest collection rate in North America.[113]

In Michigan, all child support orders are filed with an agency called the "Friends of the Court," which collects all payments, records them and sends them on to the custodial parent. If a payment is not made on time, computerized enforcement measures are triggered automatically.

2. Its main enforcement tool must be ***continuing wage garnishment***, which seizes salaries not only for arrears but also for future payments as they become due. An Ontario-type system of summoning defaulters to appear before judges who often sympathize with their hard luck stories and reduce or cancel arrears is ***not*** desirable. If valid reasons exist to reduce or cancel the amounts ordered, it should be done through the regular procedure which allows the support debtor to apply for a variation or cancellation of his/her obligation following a change in circumstances.

Subject to a minimal reserved amount (not a percentage), all wages and wage replacements such as unemployment insurance and pensions, whatever their source, should be subject to garnishment/attachment for future as well as past support obligations. Also, as recommended by the Federal-Provincial Committee on Enforcement of Maintenance

Orders, "Garnishment to enforce a maintenance order should enjoy the highest priority," meaning that the seizure of a salary for other debts "would be prohibited insofar as they would defeat a maintenance order."[114]

3. ***All sources of income*** and all types of properties should be subject to being seized or sold for the payment of maintenance debts, including amounts payable by governments, such as income tax refunds and interest from Canada Savings Bonds.

4. Support obligations provided for in ***separation agreements*** should be enforceable in the same manner as court-ordered ones.

5. All governments, agencies and individuals possessing ***information*** on the whereabouts and employment situation of family members that could help in obtaining and/or enforcing support orders against them should be required by law to release it to the appropriate people. Those who are worried that the release of such information by governments would lead to unjustified prying into people's private affairs can be reassured by the glowing evaluations given to the American Parent Locator Service, which has had access to all social security, tax and other federal data sources since 1975.

Two quotes illustrate the tremendous change in attitudes which took place in the United States toward that program in a very short time. In 1974, when it was being proposed, the Washington Post characterized it as "an unwarranted intrusion of the federal government (into personal lives that) would yield little while costing a great deal . . . The benefits to be derived are minimal at best, the dangers are incalculable."[115]

By March of 1978, the Washington Post had been converted:[116]

> About 1 million parents who otherwise would pay nothing are now making payments. And the more than $1 billion anticipated in this fiscal year in child-support payments obtained for welfare mothers or other families where the father has disappeared or refused to support the children is equal to about 10 percent of the entire national cost of the Aid to Families with Dependent Children program.

It is hoped that Canadian authorities will also see the light in this matter before long.

6. ***Jailing*** should be retained everywhere as a last resort. While some people are reluctant to recommend the use of jailing for nonpayment of support because they say that the only men who actually end up in jail are the down and out, others point out that whatever its drawbacks the threat of jail has the great advantage that "it works."[117] When it comes down to the wire and men know they will soon be thrown in a cell, they say, it is amazing how most of

them somehow manage to find the necessary amount.

7. All levels of government should make enforcement of support a priority and devote the ***necessary resources*** to it. As demonstrated in Ontario, even the best system on paper can end up being worthless in practice if it is not given the funds and staff needed to do a decent job.

Here again, the broad scope of the American government's commitment to support enforcement puts our own pitiful efforts to shame. Nor can our split jurisdictions be used as an excuse to delay or do nothing since the U.S. system operates in a very similar framework. Under the American federal Child Support Enforcement Program,[118]

> State authority and state laws remain the primary vehicles for establishing paternity and child support collection. What is new (since 1975) is that the federal government has become an active stimulator, overseer and financier of state collection systems . . . If . . . the enforcement program (set up by a state) meets federal standards, the state receives 75% of the program's cost.

After seven years of operation, assessors of the Child Support Enforcement Program are concluding that it is "good — even excellent." Under it, they say, "Enormous progress has been made toward alleviating a serious social problem."[119]

It is very unfortunate that nothing so positive can be said about the Canadian governments' efforts or even plans to improve family support enforcement in this country.

Getting back to Mary Ann, we find that the next official news she received from her ex-husband was through a notice informing her that he was applying to the court which granted their divorce, asking for a reduction in his maintenance payments. The change in circumstances he was invoking was that he had married his live-in girlfriend who had to leave her job following the birth of their child.

Mary Ann was outraged at this request and couldn't believe the law could be so unfair. As we saw earlier, however, in the present state of the law Jim's application had a good chance of succeeding. When the case got to court, Mary Ann's support order was cut from $500 a month (the first two years having expired) to $250. She had no other option but to apply for welfare.

Stage 5 — Interprovincial Collection and Welfare

Two years later, Jim and his new family moved to Alberta and he decided this would be a good time to stop making payments to the Ontario welfare department for the support of his first family.

The reason he was making payments to the department of welfare rather than directly to his ex-wife is that in cases of unreliable payers such as himself, the department's

practice is to give a cheque for the full amount of Family Benefits to the wife every month and collect the support payments directly from the husband/father.

This posed no problem in the case of Mary Ann and she signed over her rights to the department without hesitation. In the case of her friend Joan, however, the same rule caused a great deal of trouble because her ex-husband was a violent man who came around to beat her up every time he was forced to make a support payment.

This was also an issue when Quebec set up its support collection service two years ago. When the welfare department first advised all the assisted wives that they would be required to cooperate in actions against their husbands, such an uproar ensued that the matter was then abandoned. Quebec's welfare recipients are still left free to decide whether or not to help the department in pursuing their spouses.[120]

When the Ontario welfare department heard that Jim had left town, it started to put pressure on Mary Ann to tell them where he had gone. She had no idea, so the matter was finally put in the hands of the department's tracing officers.

One might think that Mary Ann would have been indifferent to the matter since her welfare cheque came to the same amount whether or not Jim had paid anything. But this was not the case because Mary Ann's years of practicing typing by herself were about to bear fruit and allow her to take a paid job. As a result, the extra $250 a month she might get from Jim in addition to her salary was very important to her.

She therefore became involved in the question of interprovincial enforcement of maintenance orders and found out that the present system is a mess. The first problem is that no inter-provincial tracing system exists to find the whereabouts of defaulting spouses/fathers. In most cases it is left up to the woman herself to take the necessary steps (such as questioning neighbours, hiring investigators, etc.) to find his new address.

Even if the husband is found at a reasonably stable address in another province, the original judgement cannot be enforced until it has been officially recognized there. This is simplest in cases of maintenance orders following a divorce, because these can be registered in any superior court in Canada and can then be enforced in the same manner as local orders.[121]

This doesn't sound too bad, but the hitches are that:

- ☐ this registration and enforcement process often requires hiring an out-of-province lawyer, which can be a very expensive

proposition for those who can't go through legal aid or the welfare department

- the enforcement will only be as good as that which applies to local orders — meaning quite poor, in most cases

As a result, according to a study prepared for the Law Reform Commission of Canada:[122]

> Experience has demonstrated to the practicing lawyer and disenchanted former spouse that the existing provisions (of the Divorce Act) are not adequate in themselves to make it practically feasible for an ex-wife in, say New Brunswick, to collect maintenance from her former husband in Alberta, unless she is possessed of such an embarrassment of riches with which to pay legal costs as would seem to obviate the need for maintenance.

If the maintenance order was not connected to a divorce action, but arose out of an action taken under provincial separation, alimony or deserted wives' legislation, the recognition of an out-of-province dependent's rights is cheaper in theory but quite useless in practice. It consists of using the provinces' Reciprocal Enforcement of Maintenance Orders Acts (known as REMOs), which exist between all the provinces except for one mysteriously missing agreement between Quebec and Saskatchewan.

Under these reciprocal acts, "final" maintenance orders (which are those made before the husband leaves his original province) and "provisional" maintenance orders (which are obtained after the husband has left) are forwarded from one province to the other through the offices of their respective Attorneys General. Once these orders arrive at the court of the husband's new residence — which has been known to take more than a year — final orders are registered and enforced in the usual way, but provisional ones are either confirmed, modified or dropped after a local hearing whose purpose is to give the husband a chance to tell his side of the story.

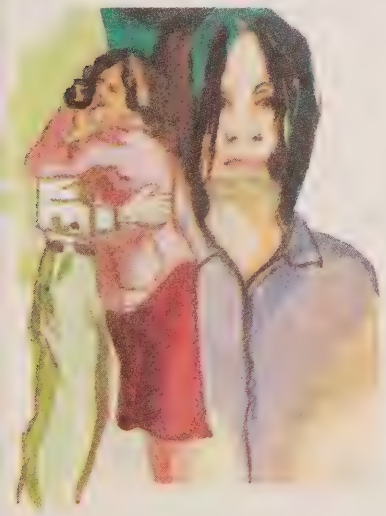
Here again, whether the order is a registered final one or a confirmed provisional one, the enforcement can only be as good as that for local orders. It is usually worse, in fact, because the "receiving" provinces have traditionally shown little enthusiasm in executing "foreign" judgements against their own residents.

From all the above, it is clear that Canada's system of interprovincial support collection can use some improvements. Two main changes that would upgrade the present REMO system are better local enforcement mechanisms and the general adoption of the Manitoba and New Brunswick practice of appointing legal counsel to represent out-of-province recipients of maintenance ***without cost***.

Proposals to improve the enforcement of orders issued under the federal Divorce Act include:

1. The development and linkage of federal and provincial ***information data banks*** for the purpose of locating absconding spouses/parents. This is supported by the Federal-Provincial Committee on Enforcement of Maintenance and Custody Orders in Canada,[123] but no timetable for its establishment has yet been produced.

2. Amendments to the Divorce Act to empower divorce courts to issue ***continuing garnishment orders*** that would have effect everywhere in Canada. Bills to achieve this were introduced by two federal members of Parliament in 1978[124] and 1980,[125] but the government never acted upon them or even provided a thoughtful comment on the subject. A study prepared for the Law Reform Commission of Canada made the same recommendation, appending a legal opinion concluding that such a measure is within the jurisdiction of the federal government.[126]



3. The collection of all outstanding support payments through the tax-raising mechanisms of the ***Department of National Revenue***. Such a system is certainly possible, as evidenced by the fact that it has been in force in France for a number of years, but the Federal-Provincial Committee on Enforcement rejected it out of hand for the unenlightening reason that it was "considered not readily implementable on a long-term basis."[127]

The usual reasons for rejecting the tax-collector's route are that it would "undermine the effectiveness of the income tax laws and lead to widespread evasions and concealment of income."[128] However, it seems more likely that anyone who now thinks he or she can get away with not declaring part of his or her income is already doing so.

According to experts Judith Cassetty and David Chambers, who have been studying this problem for years and confronting similar jurisdictional questions in the United States, such a federal system of wage withholding through existing federal mechanisms is the only viable solution for the future.[129]

4. The establishment of a federal system of ***government-insured loans*** to help ex-spouses make lump sum settlements. This possibility was first raised by Edward Ryan in a study on support

enforcement for the Law Reform Commission of Canada, in which he likened it to the Canada Student Loans system.[130] It was further developed in a paper prepared by the Parliamentary Library for M.P. Céline Hervieux-Payette.[131] It would be the ideal answer to the desire of many ex-spouses to have nothing whatsoever to do with each other after their divorce. It would also mesh very well with the proposals mentioned earlier for a final "equalization payment" that would replace periodic spousal support.

While this is obviously a futuristic idea at this time, it should be kept in mind because of its obvious advantages. In the long run, it may be that the losses (if any) the government might assume under such a system would be much lower than the cost of welfare spent to support rising numbers of impoverished female single parents and their children.

5. ***Advance payment*** by the government to the recipients of maintenance whose ex-spouses are defaulting on their payments. The government would then reimburse itself by collecting these amounts from the defaulting spouse. This system, which has been in existence in Sweden for a number of years,[132] was rejected in France because payments geared to support orders or agreements would obviously discriminate against poorer families (where the husband is too poor to owe support) and families where the single parent is widowed.

Sweden circumvented these difficulties by giving the same basic amount to all single-parent families, whether or not the parent was divorced and whether or not support was payable. The overall result is a much higher family allowance to single parents than to dual-parent families.

This is an interesting idea, and not as new in Canada as would appear because we do have tax benefits that apply only to single parents. However, this proposal would require more study before a thoughtful conclusion could be reached.

Getting back to Mary Ann, we find that after a long wait and a great deal of trouble, she finally tracked down Jim in Alberta. Although the Alberta court cancelled the arrears that had accumulated before he could be found and summoned to appear, she ***was*** successful in getting him to resume his $250 monthly payments.

This came at a good time because Mary Ann had just started her very first paid job as a receptionist for $9,000 a year and she could really use the extra money.

Financially, things went much better for Mary Ann from then on. When her father died soon afterwards and left her $30,000 in his will, she used it to pay most of the cost of a modest but pleasant row house in the suburbs.

The only disagreeable surprise she had that year was a nasty notice from the Department of National Revenue advising her that she had failed to declare her $3,000 of child support payments as part of her taxable income as required by law. Mary Ann had not deliberately left it out — she simply did not know it had to be included.

Upon thinking it over, she concluded that this tax rule was unfair because it forced her to pay tax on money that was not meant for herself but only for the children. She agreed with the statement of the Canadian Advisory Council on the Status of Women to the effect that:[133]

> Money received by an estranged wife for her own support can truly be said to be under her full control. As she can spend these sums in any way she wants . . . it is fair to add them to her own income for tax purposes.
>
> On the other hand, money received by an estranged wife for the maintenance of the children in her custody is not under her full control. She is in a position similar to that of a trustee holding money for the benefit of the children, and she is not free to spend this money in any way she wishes. As trustees are not expected to pay tax on the money they administer for others . . . women in this position should not have to pay tax on the money they receive for child support.

This reasoning, which is the one used in the United States, makes much more sense than the Canadian one. It could be implemented by amending the Income Tax Act in Canada so that recipients of child support payments would no longer have to include these payments in their taxable incomes. Instead, tax on these amounts could be paid either by the paying parent or (alternately) by the children for whom the payments are intended. As children seldom have money of their own, this last solution would mean that tax would almost never be paid by anyone on child support payments.

Having thus followed Mary Ann through what was undoubtedly the worst period of her life, we will now turn to her mother Betty, who is also having spousal money problems of her own.

Mary Ann's mother, Betty, had not had the happiest of lives with her husband but they had reached an understanding a long time ago. He did his own things (walking the dog, gardening, reading the paper from cover to cover when he got home from his work as a bus driver), she did hers (shopping, visits to her friends, volunteer work of various kinds), and neither interfered with the other very much.

It never occurred to Betty to wonder what would happen when her husband died. Had she thought of it, she would probably have assumed that things would just continue pretty much as before.

When he did die, however, everybody was surprised because he left a will giving half his savings to each of his two daughters and the matrimonial home to a gardening society. As his pension from his employer had died with him, his widow was left at 55 years of age with nothing but a meagre survivor's benefit of $208 a month from the Canada Pension Plan.

When she went to see a lawyer to find out what could be done, she was told that the Ontario law which gives divorcing wives a share of some categories of properties at the time of marriage breakdown does not apply if the marriage ends in death. Unlike widows from Newfoundland, Nova Scotia, New Brunswick, Quebec, Manitoba and Saskatchewan, she was not entitled to a share of her husband's property on the basis of their having been partners during their life together.[1]

Betty's only recourse, which exists in all common law provinces, was the law which gives dependents the right to apply to the courts to obtain some money out of their spouses'/parents' estates when the deceased wrote wills that failed to provide adequately for their support. This is a right similar to that of support on divorce, which varies according to a person's means and needs as estimated by the courts.

The only province which does not have this kind of posthumous support legislation is Quebec. Because of this, Quebec women and men married under a regime of separation of property (through a marriage contract) have no protection at all against being left penniless upon their spouses' death.

The Civil Code Revision Office of Quebec recommended that this be corrected. It proposed that all spouses, whatever their wills or matrimonial regimes, receive a minimum guaranteed share of the estate of their husbands or wives. This would amount to half of the total value of the estate if there were no children, and one-quarter otherwise. It could only be renounced by a

specific clause to that effect in a marriage contract.[2]

These questions are currently being studied in Quebec. Reports indicate that the guaranteed share approach has little chance of being retained, but that a common-law-type provision of support after death will probably be implemented there before very long.[3]

Betty therefore applied to the court and furnished proof that she had not been left enough money to maintain her usual quite modest lifestyle. After studying her case carefully (and humiliatingly), the court granted her the use of the family home for the rest of her life as well as a small income to take care of her everyday needs. Between this and the small pension from the Canada Pension Plan, she ended up with a standard of living slightly higher than the poverty level.

And so the story of Betty ends reasonably well. She was certainly luckier than her friend Mildred, who had been divorced at the age of 57. When her ex-husband Herbert died at the age of 62, the generous alimony he had been paying her out of his civil service pension abruptly ended.

Since the law of Ontario (unlike that of many other provinces) gives dependent ex-spouses the same right to apply to the courts for posthumous support as widow(ers), Mildred was theoretically entitled to the same recourse Betty had used. Unfortunately, this would have been useless because Herbert was a spendthrift without a penny to his name. His only income had been his pension, and that disappeared with him when he died. The only exceptions were the surviving spouses' benefits from the Canada Pension Plan and his civil service pension — but those went to his new 52-year-old wife.

On the basis of the above, and of other similar hardship situations caused by family and pension laws, women's groups have at various times made the following recommendations:[4]

- ☐ to amend family laws to ensure that all provinces and territories entitle widow(ers) to property rights at least as generous as those of divorced spouses

- ☐ to continue a dependent ex-spouse's right to support after the death of the other spouse, this right to be exercised against the estate of the deceased
- ☐ to increase the federal Old Age Security and Guaranteed Income Supplement benefits to ensure that all Canadian senior citizens will be entitled to incomes above the poverty line
- ☐ to change the Canada and Quebec Pension Plans to provide for the following:
  - an expansion in retirement benefits to 50 percent, instead of 25 percent, of a person's average earnings up to the Average Industrial Wage
  - the automatic equal splitting, on divorce or when both spouses reach the age of 65, of the Canada/Quebec Pension Plan credits both of them earned during their life together; all renunciations of these rights would be completely void
  - the direct inclusion of homemakers in the Canada and Quebec Pension Plans to give them personal pension benefits that would recognize the value of their work
  - the prorating of survivor's benefits between the present and former spouses of deceased contributors
- ☐ to amend the laws regulating employer-sponsored pension plans to oblige them to provide surviving spouses' benefits unless these are renounced by both spouses

Conclusion

A few years ago, much was heard about the "death of the family" and the "end of marriage." In 1973, even economist John Kenneth Galbraith was writing that[1]

> (W)omen should be expected and encouraged to regard marriage not as a necessity but as a traditional subordination of personality . . . It should be the choice of many to reject the conventional family in return for other arrangements of life better suited to individual personality.

A decade later, it has become obvious that marriage and family are not going to disappear. Nevertheless, there are indications that both of them are going through important transformations.

One reason why these institutions are changing is that independent young women are increasingly unwilling to put up with their restrictions. Faced with customs that make them almost solely responsible for bringing up the children, and laws that deny them equal control over the couple's finances, they are reacting by being less inclined to marry, by marrying older and even more importantly, by having much smaller families than their mothers.

In doing so, women are sending a strong (though so far unheeded) signal to husbands and governments. The message to both is: if you don't contribute to raising the next generation and if you don't do something to correct the present situation where we have to work double days for half the pay, we might simply decide not to have children any more.

The measures required to make married women equal within the family (and society) are simple and well known. They are:

- ☐ recognition of the value of the work done in the home
- ☐ legal recognition that whatever the distribution of tasks between the spouses, marriage is an equal partnership in which both spouses are entitled to equal rights over all the money and benefits both of them acquire through their efforts during their life together
- ☐ laws forbidding all discrimination against women by reason of their sex (including pregnancy) or family status
- ☐ positive steps to actively encourage the integration of women in the paid labour force, including increased access to better-paying jobs and good quality, affordable child care

The adverse consequences of the present lack of equality within marriage are gravely compounded by the other major cause of the transformation of the family, which is the tremendously increased frequency and ease of marital breakdowns. Forty

percent of today's marriages are expected to end in divorce and when they do, our present laws ensure that the advantages and disadvantages flowing from the marriage will be very unevenly distributed between the spouses. As a matter of fact, numerous studies have shown that while marriage breakdown usually means financial disaster for women, it almost invariably entails a substantial ***increase*** in the standard of living of the men. This has led people to say that the present system encourages men, especially low-income ones, to abandon their families.

At the present time, not a single Canadian province provides, in its laws regulating matrimonial property, for the equal division between the spouses of all the monies and assets that both of them earned while they were married. As for support orders, the tendency in the last decade has been toward smaller and shorter maintenance awards. All across Canada, wives with young children (40 percent of all divorcing women) and wives who have been at home for 10, 20 and even 30 years by joint decision of themselves and their husbands are losing their homes and are being ordered to find a paid job, any paid job, as soon as possible. Those who protest this sudden change of rules are often sneered at and dismissed as "alimony drones."

In fact, it would seem that alimony for ex-wives is rare in Canada (only five percent of all ex-wives and 18 percent of those with young children are awarded it). Child support awards typically amount to less than half the minimal cost of bringing up a child (***not*** including the cost of child care). Furthermore, only about one-third of the ordered amounts are paid on time and in full. It is therefore not surprising that close to half of female-headed single-parent families end up with incomes lower than Statistics Canada's poverty lines.

Are these situations inevitable? Is it true, as some say, that former husbands are paying as much as they can afford and will skip town if they are forced to pay more? The answer to both these questions is no, definitely not. By all accounts, delinquent fathers/husbands are quite easy to find and could afford to contribute a great deal more than they are doing now. The main reason they are not paying now is their (accurate) belief that they can get away with it.

What could be done to improve the situation? Many things. Alimony/maintenance criteria could be fairer and less arbitrary. Amounts of

support could be calculated by rational and objective means. Finally, collection of unpaid awards could be radically improved as demonstrated by the success of the Manitoba and Quebec collection systems and the Child Support Enforcement Program in the United States.

As the above indicates, women are still definitely unequal within marriage and the family but the means exist to correct the situation. The program to be followed is clear. All that is needed is a little political will and a great deal of female determination.

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